CONSTRUCTION CONTRACT CLAIMS AND METHODS OF AVOIDING CONTRACT LITIGATION THROUGH DISPUTE RESOLUTION ALTERNATIVES

BY

JOSEPH C. LAVIGNE

A REPORT PRESENTED TO THE GRADUATE COMMITTEE OF THE DEPARTMENT OF CIVIL ENGINEERING IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF SCIENCE

UNIVERSITY OF FLORIDA

Summer 1993

CONSTRUCTION CONTRACT CLAIMS AND METHODS OF AVOIDING CONTRACT LITIGATION THROUGH DISPUTE RESOLUTION ALTERNATIVES

BY

JOSEPH C. LAVIGNE

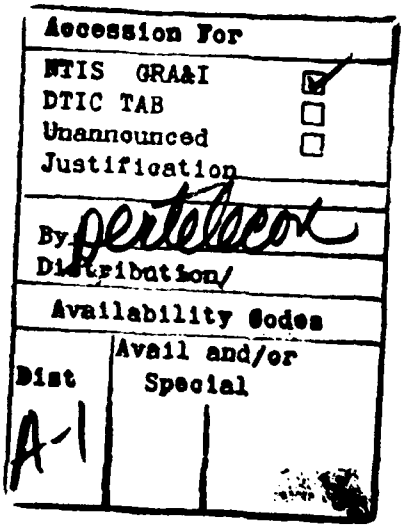
A REPORT PRESENTED TO THE GRADUATE COMMITTEE
OF THE DEPARTMENT OF CIVIL ENGINEERING IN
PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF MASTER OF SCIENCE

UNIVERSITY OF FLORIDA

Summer 1993

TABLE OF CONTENTS

St#A, USNPS/Code 031
(Ms. Marsha Schrader - DSN 878-2319)
Telecon, 27 Aug 93 - CB



CHAPTER ONE
INTRODUCTION

In recent years, construction contract claims have grown at an alarming rate. It has become increasingly more difficult for contracting parties to achieve bilateral agreements in an equitable, effective and timely manner (6). Litigating disputes is being abused as a cure-all means within the construction industry, generating a disproportionate growth in court cases. Relaying on the legal system to judge and resolve a contractual problem is counterproductive to getting the job done. It is also an extremely time consuming and expensive undertaking for all parties. Therefore, it behooves every contracting party to strive for timely completion of the work. Resolving differences "in-house" when possible and avoiding litigation at all cost is a worthwhile endeavor. This can be accomplished through cooperation, meaningful, open-minded negotiations and a team approach to managing the contract execution.

The purpose of this research paper is to investigate the reasons behind the increasing trend toward adversarial contract relationships and claims. It also looks at possible disputes resolution techniques that can be used to short circuit the costly and exhaustive path to litigation.

The topics covered in the following six chapters of this research paper discuss construction contract risk, contract disputes, arbitration and other forms of resolving disputes, and partnering. The material covered in these chapters highlights possible causes for and resolution of construction contract disputes.

Chapter Two addresses the allocation of construction contract risk and it's extremely important role in the development of contract disputes. Risk avoidance, risk allocation, risk management and some of the pitfalls of inappropriately assigning risk to a party who can not manage or control it's destiny will be discussed. Chapter Three looks at how changes, claims and disputes develop over numerous controllable and sometimes uncontrollable circumstances. The prime causes of construction contract changes and their subsequent role in generating contract disputes will be investigated. Chapter Four focuses it's attention on the development of judicial support for use of arbitration to mediate disputes, technical differences between contract arbitration and judicial litigation, and some of the legal problems faced by arbitration. Chapter Five is devoted to studying the intricacies of arbitration as a forum for contract dispute resolution. Chapter Six takes a cursory look at other forms of contract disputes resolution techniques in use today. Finally, Chapter Seven is devoted to the partnering process and it's potential role

for solving the litigious nature and mounting decay of the contractual process within the construction industry.

Most privately funded projects designed by an architect incorporate standard American Institute of Architects (AIA) documents into the contract specifications. The General Conditions of the Contract for Construction, AIA Document A201, mandates arbitration between the contracting parties to resolve contract disputes. Specifically, the arbitration clause under Paragraph 4.4 of AIA Document A201, stipulates that disputes, "shall be settled by arbitration according to the Construction Industry Arbitration Rules of the American Arbitration Association[AAA]" (3-12).

Both of these influential professional organizations greatly impact the way we contract for construction services and mitigate disputes. Though their standard procedures may not fit every contract scenario, these two organizations are still possibly the most prominent authorities effecting the way we execute contracts and resolve disputes today.

Secondly, contracting through the use of a fixed price, competitive bidding strategy is still a way of life both in the private and public sector. With these two points in mind, my research paper directs a great deal of attention to the application of AIA contract requirements and AAA arbitration rules to fixed price, competitively bid projects.

The material covered within this paper by no means is intended to exhaust the potential mechanisms or alternatives

available today to regain control of the construction contracting process through disputes resolution at the project level. However, it provides the reader with a solid understanding of the problems and possible solutions to help cure the disputes ailing or nations' construction industry.

CHAPTER TWO
CONSTRUCTION CONTRACT RISK

2.1 INTRODUCTION

Contracting for construction services is an inherently risky venture for the owner, design agent and contractor. All of these parties are exposed to unanticipated risks, exposure to economic loss and unforeseen contract liability while performing under the contract (15). Risk responsibility plays an important role in the development of contract disputes that arise during the construction process.

Though the risk of doing business can not be eliminated, proper risk management can lead to a smoother operation and ultimately reduce the total cost of the project for the owner, designer and contractor alike (15). Likewise, improper risk allocation can result in increased bid contingencies, higher projects costs, poor working relationships, a higher probability of disputes and the increased risk of judicial intervention between the parties (15). This chapter concentrates on the development, allocation and management of risk as it effects the construction process.

2.2 ESTABLISHING CONTRACT RISK

The owner's primary objective when planning construction is to obtain a complete and usable facility in a timely manner. Understanding risk allocation and properly applying responsible risk management techniques to the project documents will help ensure the completed structure conforms to the quality and timeliness standards as defined by the contract documents at a reasonable price (16). Improper risk allocation in turn increases the potential for claims, disputes and the need for litigation. Unrealistic expectations and performance demands placed on a contractor under a competitively bid, "bargain basement" price sets the stage for conflict from the onset of the project.

The owner selects the contracting method used to undertake the construction project. Whether the contract is competitively bid, negotiated, fixed price, cost-plus-a-fee or guaranteed maximum price will play an important role in the contractual relationships that develop between the contracting parties (6). However, nearly all publicly funded and many privately funded construction projects are awarded as competitively bid, fixed price contracts. This system of contract award has been, and possibly will remain, the primary method of obtaining construction contractor services for some time to come (16). It is also possibly the riskiest type of contract to undertake for the contracting parties. Delivery of a facility based on a bottom line figure has an extremely high potential for

failure. Costs are sure to escalate due to changes for which, in some cases, neither the owner nor the contractor want to assume the risk responsibility for. Disagreements and disputes tend to be pervasive under the risk of unanticipated cost overruns and liability exposure allowing lawsuits to permeate this high stakes venture.

The advantage of the fixed price contract method of award is that it provides the owner with a reasonable guarantee of the total project cost at the time of bid opening. Though contract modifications are a way of life within the construction industry, a properly prepared set of contract documents can provide the owner with the desired construction quality while limiting the potential risk of unforeseen cost escalation caused by changes (15). The quantity of contract modifications can be projected as a percentage of award based on the type and location of construction being undertaken so long as the contract documents are adequately developed. This can be done with sufficient accuracy for the owner to incorporate enough contingency into the project budget to cover the anticipated increases in contract price due to the changes that will occur during the construction process. Conversely, a poorly planned and designed project will result in a greater degree of design errors, omissions or implied but not clearly specified work that will be a point of protest between the contracting parties. Under these circumstances, completing the project as planned, scheduled and budgeted for may be

unrealistic. These impractical performance expectations may create undue friction between the parties thought the performance period (15).

For the owner, another major advantage of a fixed price contract is that a substantial portion of the contract risk is assumed by the contractor. However, as noted, the trade off can have significant monetary repercussions if the contract documents are incomplete, inconsistent or vague. With an adequate design, changes to the contract should remain within the anticipated budget protecting the owner from the risk of creep in the overall project cost. In essence, with an adequately designed fixed price contract, the owner is protected from the risk of price fluctuations and project cost overruns which the builder will have to shoulder. In the absence of unanticipated change orders on the project, the owner is exposed to minimal project risk (6).

One of the main disadvantages of fixed price contracting is that it encourages marginal bidding and frequent underbidding of construction projects. Though it may seem to lack sound business judgment for a contractor to underbid construction projects, this is often done in a highly competitive construction market in an effort to generate a sufficient volume of work to keep the company afloat. With the construction industry already faltering and the federal government making major cuts in federal and

defense construction budgets, the construction market will continue to shrink, intensifying the already overly competitive industry.

As competition for construction work tightens and prices fall, contractors are increasingly forced to gamble on higher risk projects (15). The project documents become black and white and contractors become less agreeable to taking responsibility for the gray, ambiguous work not clearly defined by the contract documents. At other times a bad gamble may lead to run away project costs forcing the contractor to look for ways to cut expenses (15). The contractor may be left with no alternative but to search for loopholes in the contract documents that can give him the leverage needed to capitalize on high return change orders.

Owners and designers, on the other hand, often try to separate themselves of contractual risk or liability by incorporating catch all clauses into the contract documents that attempt to make the contractor liable for work he can not control or which is not clearly identified at bid time (6). These clauses unfairly place the responsibility for shouldering a majority of the construction risk on the back of the contractor. The owner and designer may try to enforce performance of these sometimes unrealistically demanding contract clauses by withholding payment from the contractor through retention of funds for what they perceive as the contractor's unwillingness to perform in accordance with the contract documents. As a result, from the onset of

award an adversarial relationship between the parties develops. Neither party ends up trusting the other to assume their reasonable share of the contract responsibility and risk.

These types of risk avoidance have underscored the construction industry's ability to get the work done without third party intervention. Without compromise, the likelihood of ensuing disputes, claims and litigation will surely follow. These disputes are perpetuated by both parties' unwillingness to equitably share the responsibility and risk associated with completing the project. The current mood in the industry that only one party can come out ahead at the end of the contract has been the catalysts behind the movement away from a cooperative venture towards one filled with conflict and hostility. Unfair risk allocation encourages this attitude.

2.3 TYPES OF CONTRACT RISK

Contract risk comes in many forms and can be generated by numerous sources throughout the life of the contract. Some of those risks are controllable, such as the length of the contract period to complete the project, and some are uncontrollable, such as weather. Smith has broken contract risk down into two types, those associated with contracting and those associated with construction (15). He believes contractual risk increases as the clarity of the contract requirements, communication and timely contract

administration decreases (15). He further suggests that the inherent construction risks that develop due to factors the contracting parties can not control are issues such as weather, site conditions and resource availability (15). Smith asserts that contractual risk can be reduced through the thorough development of the contract documents whereas construction risk can only be managed (15).

Though not comprehensive, Smith developed the following list exemplifying the risks the parties may encounter during project execution:

1. Adequacy of project funding.
2. Subsurface conditions.
3. Adequate labor force.
4. Political climate and interference, community activism.
5. Adequacy and availability of owner representative.
6. Permits and licenses.
7. Site access.
8. Sufficiency of plans and specifications.
9. Innovative design.
10. Owner involvement in design.
11. Appropriate designer involvement in construction.
12. Late or unsuitable owner furnished material and equipment.
13. Delayed deliveries.
14. Delay in presenting problems.
15. Delay in addressing and solving problems.
16. Labor productivity.
17. Subcontractor capability.
18. Delays and disruptions.
19. Worker and site safety.
20. Adequacy of performance time.
21. Changes in needs or requirements of finished project.
22. Governmental acts
23. Acts of God.
24. Union strife and work rules.
25. Cost escalation.
26. Overlapping insurance coverage.
27. Unreasonable systems performance guarantees. (15-8)

2.4 ALLOCATING CONTRACT RISK

In discussing contract risk, Barrie states that, "in the traditional construction process, the parties should have well defined duties and liabilities coupled with the ability to manage, carry out, and control the duties" (6-451). Contract risk can therefore only be faithfully assumed by all parties if they have the ability to control the outcome associated with the risk. The owner and the designer set the stage for risk allocation when developing the contract documents. The potential risk exposure to each party should be clearly defined by the contract, giving the risk to the party that can manage, control and bear the cost the best (15).

Unfortunately, a great source of disputes in construction contracts arise today when the owner or design agent attempts to abandon their professional obligations by shifting unrealistic responsibility for the contract risk and liability to the contractor through the wording incorporated in the contract documents. These, "risk transfer provisions of the contract" unduly force additional contractual risk on the contractor without empowering him with the ability to mitigate or control it (6-451).

Barrie gives an example of this practice citing the "site-of-the-work clause" used frequently in state and private contracts (6). This clause places the risk of both site and subsurface conditions on the contractor. More specifically, the site of the work clause reads in part,

"any interpretations or evaluation of the subsurface investigation record made by the bidder shall be at the sole risk of the bidder" (6-451). Though the owner and designer spend a significant amount of time, money and effort to research, test, and analyze the site conditions prior to project development, this clause unfairly places the risk of unknown site conditions on the contractor. The contractor has no control over these unknown site conditions since his exposure to the project site is limited to the documentation made available to him at the time of bid and through a brief prebid site visit.

Another good example given by Barrie is in the incorporation of a Critical Path Method (CPM) schedule requirement into the contract specification (6). This specification may call for the owner and the contractor to share the contract float (6). The outcome tends to lean in favor of the owner since he is the approving authority for project scheduling. The schedule approval process allows the owner protection through risk avoidance of delay claims since he can force the contractor to plan the work over the entire contract period. Though the contractor may be able to complete the work ahead of schedule, the approval process allows the owner to infringe upon the contractor's right to sequence and complete the contract in the most cost effective fashion he deems fit (6). Should the contractor be delayed beyond the anticipated early completion date he

projected due to owner negligence, the owner will be protected from delay damages through his control over the project float (6).

Risk transfer provisions of a contract such as the examples just given are often times disputed when an unforeseen problem arises during construction. The owner attempts to eviscerate responsibility for the problem and the associated cost since he maintains the risk was contractually the responsibility of the contractor. Conversely, the contractor feels no obligation to a risk he had no control over at the time of bid. Under these conditions, ensuing law suites can be expected when a fair and reasonable solution or compromise can not be mutually negotiated.

Increasingly, juries are tending to side against the contracting party who is perceived to have been unfairly enriched through the use of risk transfer provisions regardless of the exculpatory provisions of the contract that shifts the contract risk inappropriately (16). Unfortunately, all the parties to the contract lose when disputes arising from exculpatory contract provisions are left unresolved and litigation becomes unavoidable. Barrie clearly points out that, "in many construction lawsuits, the sum of the parties' direct expenses, court costs, expert witness and attorneys fees is often in excess of the final award and is not received until many years after construction completion" (6-452). Shedding confrontational

attitudes, sharing the responsibility of risk equitably and working toward conflict resolution from the start, will ultimately be in the best interest of these parties, both financially and professionally.

2.5 PROJECT RISK MANAGEMENT

Mason has stated that identified risks can be managed by either avoidance, abatement, retention or transfer (15-3). Avoiding, retaining or transferring the risk does not minimize its potential effects on the project or the contracting parties. Therefore, as Smith believes, the impetus behind an effective contract is through effective management of the contract risk (15). He states that:

> Contract preparation that allocates risk with a balanced input from all parties will be most cost effective....How these risks are allocated among parties to the contracting process has a direct bearing on total project cost. (15-1)

Therefore, it is up to the owner and designer to properly develop a contract risk management strategy for those risks which are controllable. When developing the project documents, the owner and designer should ensure the contract risk management strategy employs fair and equitable treatment to all the contracting parties. The owner and designer should evaluate each potential risk based on its capability to impact the overall project cost or time of performance (15). This may bring to light an unequitable or unusually high risk to one of the parties. The owner and

design agent may then be able to eliminate or reduce these types of risks to a reasonable level through careful project document development.

The general terms and conditions within the contract specifications contain the clauses which allocate the risk to the contracting parties and defines the responsibility and liability of each in carrying out the contract (6). It is in the general terms and conditions of the contract that the owner and designer must incorporate the risk management strategy to be implemented. Barrie asserts the following contract clauses of the general terms and conditions of the contract set the stage for contract risk management:

1. Definitions.
2. Quality interpretations and variations.
3. Examination of work site.
4. Subsurface exploration.
5. Changes and alterations.
6. Extra work.
7. Authority of the engineer.
8. Cooperation with others.
9. Minimum wage rates.
10. Responsibility for damage claims.
11. Contract time for completion.
12. Adjustment to contract time.
13. Termination of contract.
14. Failure to complete and liquidated damages.
15. Right of way or access delays.
16. Measurement of quantities.
17. Compensation for changes and alterations.
18. Claims for additional compensation.
19. Notice requirements.
20. Payment for extra and force account work.
21. Progress payments and retention.
22. Mobilization payment. (6-452)

The owner and designer should carefully scrutinize these clauses and review risk management thoroughly. The owner controls risk allocation through his approval of the

general terms and conditions of the contract. Though he may desire to minimize his risk in completing the project, knowingly placing an unfair portion of the risk on the contractor will not protect him as anticipated. In reality, he exposes himself to potentially higher bid prices, project delays and an increased risk of time consuming and expensive dispute proceedings (15).

When planning the project, Smith believes the owner and designer should take the following actions to help lower the overall risk during project execution:

1. Review and revise "front end documents".
2. Invest a little more to obtain more geotechnical information. Make all geotechnical information available to the contractor.
3. Make use of constructability reviews.
4. Real time disputes resolution.
5. Realistic contract performance time.
6. Recognize the need for budget contingency.
7. Planned communication.
8. Pre-planning for permits/utilities/zoning.
9. Use the differing site condition clause.
10. Recognize that design is a very small and often underfunded component of cost.
11. Delegate decision making authority to owner's site representative. (16-15)

When determining whether to bid on a particular project, contractor's should likewise carefully scrutinize the general conditions and terms of the contract to assure risk is equitably and fairly distributed to both parties (6). A contractor should determine the desirability to bid on a particular project based on an evaluation and subsequent determination of the risk involved in the project and the need to include excessive contingency protection in

the bid proposal (6). If the decision is to bid on the project, the inclusion of a significant contingency to the total bid price will be necessary to limit the contractor's exposure to a potentially risky venture.

An examination of the general terms and conditions of the contract by the contractor should focus on the owner's fairness in allocating risk, the evaluation of his risk exposure, the completion of a bid or no bid analysis and the development of a bid plan that incorporates risk management into his proposal (6).

2.6 BENEFITS OF PROPER RISK MANAGEMENT

All the parties associated with the contract benefit by proper risk allocation. The owner benefits from reduced bid contingencies, a greater probability of timely completion and fewer contract disputes that are time consuming and expensive to resolve (15). By in large, the owner is more likely to receive a fair price for a facility that meets his needs and fulfills his expectations (15). Likewise, the contractor is placed in a better position to bid more competitively and realistically through the elimination of contingency protection (15). He has a greater opportunity to do a good job and provide the customer with a quality and timely product (15). Furthermore, not forcing undue risk on the contractor reduces conflict between the parties and helps to avoid exorbitant dispute resolution (15). Lastly,

the designer is removed from assuming unrealistic liability in relation to his involvement and ability to control the final product (15).

All parties benefit from a development of relationships which maintain accountability and responsibility for appropriate contract risk. Proper risk allocation leaves the door open for fewer disputes and a reduced need of contract enforcement through third party intervention (15). Overall, the owner, designer and contractor leave the project with a greater sense of accomplishment (15).

Smith articulates the benefits of proper risk management best when he states:

> Construction projects and their participants will benefit significantly by routinely taking a more systematic, structured, and global view of (and approach to) risk than is sometimes done at present. Enhanced and broadened cognizance of the wide range of risks that could materialize during the planning, design, and construction phases of a project will result in better informed and more prudent designs, improved specifications, better informed bids, improved project relationships and communications, and enhanced construction contract administration practices. It is axiomatic that all of these, of course, should contribute to fewer misunderstandings and unfulfilled expectations, less acrimony, and therefore less time and money spent dealing with attempts to mitigate the adverse consequences of unanticipated risks. The end result is that many disputes will be avoided and others will be susceptible to resolution on the job. The entire project benefits. (15-13)

In summary, proper risk management is essential for the successful, unimpeded completion of every construction project.

CHAPTER THREE
CHANGES, CLAIMS AND CONTRACT DISPUTES

3.1 INTRODUCTION

As so astutely stated by Judge Kern at the conclusion of the civil suite between Blake Construction and C. J. Coakly Company:

> ... except in the middle of a battlefield, nowhere must men coordinate the movement of other men and all materials in the midst of such chaos and with such limited certainty of present facts and future occurrences as in a huge construction project...Even the most painstaking planning frequently turns out to be mere conjecture and accommodation to changes must necessarily be of the rough, quick and ad hoc sort, analogous to ever-changing commands on the battlefield (10-5.1).

Change and construction contracting go hand in hand in the construction business since few, if any, construction projects are completed without the need to make changes to the original project documents. Modifying the original contract documents through execution of change orders is a way of life in the construction industry.

A changed condition occurs when the construction at the jobsite must be modified from those represented in the contract documents. Changes can be initiated by one of several parties including the owner, the designer, the contractor, the subcontractors or regulator agencies. A majority of these changed conditions are minor and can be

resolved in the field through a simple alteration in the specified requirements. This can usually be accomplished without the contractor incurring lost time or an increase in cost to complete the work. These types of modifications are commonly referred to as field changes and are typically handled between the owner's representative and the contractor's site superintendent. Other changes causing either a variation in time or cost to complete or both are compensible and require modification to the terms of the contract through the issuance of a change order.

Frequently however, an issue will arise which affects the cost or time of completing the project for which it is unclear who is responsible for absorbing those costs. When the contracting parties share different opinions as to the existence, scope or extent of a noted on-site condition which falls into this gray area of contractual responsibility, a disagreement over compensation will ensue. This chapter addresses contract changes and their role in the development of claims and disputes between the contracting parties during the construction process. It also examines the claims and disputes procedures as specified in the American Institute of Architects (AIA) contract documents.

3.2 CHANGE ORDER TERMINOLOGY

It is important to fully understand the terminology related to contract modifications to better comprehend the

mechanics of claims. This section is devoted to defining the terminology used to address the topics common to construction claims (6-455).

3.2.1 Change

A change occurs when the scope of the contract work is modified or is impacted not due to the fault or negligence of the contractor. Changes are compensible in money or time or both.

3.2.2 Constructive Change

A constructive change occurs when the owner or designer fails to recognize a contractor's entitlement to a changed condition in a timely manner.

3.2.3 Change Order

The formal contract document that modifies the original contract. Change orders can be classified as bilateral or unilateral. Bilateral change orders are those which the terms of compensation are mutually agreed upon by the contracting parties. Under the AIA General Conditions of the Contract for Construction, AIA Document A201, a unilateral change order, termed a construction change directive, may be issued when the contracting parties can not agree over the equitable compensation for the change (13). In this instance the owner is entitled by contract to unilaterally issue a contract change. This

change will be issued in the amount equal to the architect's estimate of compensation pending final outcome of the dispute (13).

Under the AIA General Conditions, Document A201, a change order is defined as follows:

> A Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor and Architect, stating their agreement upon all of the following:
>
> 1. a change in the work;
> 2. the amount of the adjustment in Contract Sum, if any; and
> 3. the extent of the adjustment in the Contract Time, if any (13-3.3).

3.2.4 Claim

A formal contract procedure used to review contract disputes between the contracting parties. The claim process is identified in the contract provisions which describes the steps to be taken to protest an initial decision over the merits of a change order proposal.

3.2.5 Dispute

Claims that remain protested after completing the claims procedure become disputes between the contracting parties. The dispute resolution process to be followed is often times identified in the contract documents. Disputes may be addressed through arbitration, alternate dispute resolution techniques or litigation.

3.3 CHANGES TO THE CONTRACT

The original contract may require modification for numerous reasons due to the actions or inaction of any of the contracting parties or due to external interference. For example, changes can be caused by the owner, the designer, the contractor, unknown site conditions, acts of God or regulatory agencies (6).

Constructive changes to the contract are often the most difficult to resolve. The owner, who is responsible for instigating the changed condition, believes the contractor has neither been delayed nor has incurred additional cost. The owner's stand that the change is noncompensible immediately places the contested issue into dispute (6).

A contractor can likewise create a change the contract when he fails to perform in accordance with the project documents. Contractor initiated changes tend to be the result of a performance failure (6). A unilateral deductive change may be issued by the owner under these circumstances. Changes of this nature can create friction between the parties if the performance failure or the amount deducted is contested.

At times, neither the owner, designer nor contractor is responsible for impacting the contract performance. These changes are brought on by third party interference or other unanticipated circumstances. These types of changed conditions are also often times a point of contention between the parties if it is unclear in the contract

documents who assumes responsibility for any additional increase in time or expense under these circumstances.

3.4 CHANGE ORDER CATEGORIES

There are three categories of contract changes that generate the most difficult disputes to resolve since risk allocation is not clearly defined in the contract and neither party is willing to assume responsibility for the changed condition (6). Barrie categorizes these changes into owner and designer initiated changes, contractor initiated changes and changes not caused by the contracting parties (6). Frequently a claim will result over one of these conditions if the parties can not reach a compromise or achieve an equitable solution. In these cases, a third party is employed to adjudicate the conflict through arbitration, other alternate disputes resolution forums or litigation.

3.4.1 Owner And Designer Initiated Changes

The most common types of owner and designer initiated changes that tend to result in disputes include:

1. Numerous last minute addenda during bid period.
2. Delay in access to the site.
3. Delay in furnishing approved for construction design drawings or clarification's.
4. Delay in furnishing owner-furnished items.
5. Defects in plans or specifications including errors and omissions.
6. Major design changes.
7. Scope additions.
8. Scope deletions.
9. Schedule improvement directives.
10. Acceleration directives.
11. Suspension of work.

12. Interference by owner or his designated representative.
13. Nonperformance by owner.
14. Termination of contract.
15. Equivocal or conflicting contract clauses.
16. Slow or inadequate response to submittals and requests for information (6-453).

3.4.2 Contractor Initiated Changes

The most common types of contractor initiated changes that tend to result in disputes include:

1. Failure to start work as planned.
2. Failure to supply a sufficient work force.
3. Contractor performance failure.
4. Subcontractor performance failure.
5. Supplier performance failure.
6. Installation of defective work.
7. Poor workmanship.
8. Schedule delay.
9. subcontractor schedule delay (6-453).

3.4.3 Other Changes

The most common types of changes resulting in disputes due to acts or omissions of third parties, differing site conditions or other circumstances not caused by either party to the contract include:

1. Unforeseen changed physical site, underground or other conditions.
2. Other unforeseen site conditions.
3. Unusual weather or other natural event.
4. Regulatory agency change.
5. Change in law.
6. Labor disputes.
7. Third-party interference.
8. Third-party nonperformance (6-453).

3.5 WHAT INSTIGATES CLAIMS

Claims may involve numerous issues resulting from either the owner's or contractor's perceived failure of the other to live up to the terms of the contract

agreement (15). Having to complete the work other than as specified and planned can result in schedule delays, increased direct costs and extended jobsite and home office overhead (6). Often times views of contract risk ownership under these conditions is based on the parties prejudiced perceptions of who should bear the responsibility for the increase in time or cost. These claims can be the result of several related or totally independent events that have occurred during the completion of the project. This makes identification of responsibility and ultimate resolution very complex.

Even when the contracting parties agree a changed condition to the contract has occurred, they may be unable to reach a bilateral agreement. In part, this is due to each party's difference of opinion as to the significance of the impact on the overall completion of the work (6). Though the direct costs may be easy to establish, other indirect expenses that may have been incurred can be hard to determine. The cost and time impact of the change on other contract work and productivity are based solely on each parties perception of anticipated project efficiency. Their inability to come to terms over the effect of the change on the overall project completion is where lies the potential for claims (6).

3.6 CLASSIFICATION OF CLAIMS

Barrie has classified claims into four general areas that he categorized as:

1. Design and specification changes and additions.
2. Changed site conditions.
3. Delay claims.
4. Acceleration, compression, impact and effect, and ripple effect of above delays and changes (6-454).

The claims that develop due to design changes, specification changes, additions, changed site conditions, and delays can lead to the claims categorized as acceleration, impact and ripple (6).

3.6.1 Design Changes And Additions

Problems do not usually result from these types of changes as long as they are within the quantity and amount reasonably anticipated by the contracting parties at the time of award. When changes of this nature exceed fifteen percent of the award amount or when a large number is issued, however, project impact and overhead costs can creep for both the changed work and the work originally contracted for (6). As these types of changes approach twenty percent of the contract award amount, the contractor will begin to experience major ripple effects to the original project schedule and planned productivity (6).

By insisting the contractor maintain the contract completion date, the impact and effect of the additional work may force contractor acceleration requiring additional resources, larger crews, or overtime to stay on the original

schedule (6). Acceleration can potentially lead to a drastic drop in the productivity capabilities of the contract workforce.

With frequent change, evaluating and quantifying the overall project impact experienced by the contractor, including the actual and anticipated increase in expense and time, can be very difficult to determine. This difficulty in identifying costs often times lead to a wide variation in the perceived equitable compensation for time, money or both resulting in a complex contract dispute (6).

3.6.2 Changed Site Conditions

Design professionals and owners opinions differ considerably from contractors over whose responsibility it should be to carry the burden of changed site conditions. The risk for differing site conditions can be placed upon the contractor through the use of restrictive or exculpatory language within the contract documents (6). Regardless of the wording in the contract documents however, disagreement over assigning proper responsibility for changed site conditions can erupt into claims due to the perceived unfairness of the contract.

In an attempt to resolve this disputes problem, inclusion of a differing site condition clause into the contract absolves the contractor from all liability for conditions that differ materially from those experienced at the site (6). This rightfully places the risk of differing

site conditions onto the owner. Differing site condition clauses are presently required on all federally funded projects and are becoming increasingly more common in the private industry (6).

3.6.3 Delay Claims

Delays are fairly commonplace during the construction process. If the delays are minor in scope and do not affect the production schedule, impact the critical path or are concurrent the contract completion date will remain unchanged. Likewise, compensating the contractor for time associated with delays due to contract changes can be handled through the normal change order process (6). At some point, however, numerous delays, small changes or a significant number of changes made to the contract can affect productivity rates and the smooth flow of on-site work (6). This scenario can lead to unanticipated schedule impacts requiring compression of the construction schedule and acceleration of the work to meet the completion date (6).

Contract delays are classified as excusable, inexcusable or compensible. Excusable delays are those which are determined to be unforeseeable and uncontrollable by the contractor. Examples of excusable delays include strikes, acts of God, labor disputes and other force majeure events (6). Excusable delays are not compensible but require equitably increasing the amount of time to complete

the project as a result of the delay. Inexcusable delays are not compensible for time or money since they are due to the contractor's own negligence and are not the responsibility of the owner (6). Compensible delays are those which are caused by the actions or inaction of the owner. Issues such as contract changes, untimely response to requests for information or inaction to resolve site conflicts may be compensible both in time and money (6).

The contractor will request compensation for those delays perceived not be due to his fault or negligence. Claims for delay issues can arise when the facts surrounding the delay are complex or have been muddied by several inter-related events. Though it may be a fair assessment of the overall affects of the change on the unchanged work, the inclusion of impact, ripple, acceleration and compression into a claim further complicates the delay issue. Trying to determine the cost associated with these types of claims on the original contract is an almost impossible task. Even when both parties agree the contractor was delayed, impact, ripple, acceleration and compression claims can impair the ability of the parties to reach a bilateral agreement for the changed condition (6). Barrie states that these, "complex delay and productivity loss claims, including acceleration coupled with the impact and effect upon the overall jobsite, are difficult or impossible to settle during work performance by polarized parties whose primary

objective remains to try to minimize the damage and to complete the project" (6-457).

3.6.4. Acceleration, Compression, Impact and Ripple.

Claims associated with acceleration, compression, impact and ripple are borne out of the perceived overall impact design changes, specification changes, additions, changed site conditions, and delays have on the contractor's ability to complete the project as planned and scheduled (6).

Claims can arise from acceleration or result from directing or constructively forcing the contractor to complete the original contract work in less time than reasonably allowed for under the time extension clause of the contract (6). Under these circumstances, the contractor may be required to bear the expense of increasing his workforce or to work overtime to meet the directed completion date (6). A dispute between the owner and contractor can arise when the owner directs the contractor to get back on schedule even though the contractor feels his delay is excusable and/or compensible.

Compression claims occur when the owner directs completing more work than originally contracted for in the same amount of time as specified in the contract (6). Again, the contractor may claim any cost resulting from overtime, increased crew sizes or resulting inefficiencies to meet the directed completion date (6).

Impact cost claims can occur if there is a drop in labor or equipment productivity resulting from differing site conditions or the addition of change orders to the contract (6). The contractor is entitled to compensation for impacts to his work if additional expenses are incurred.

Ripple claims are associated with the overall "ripple" effect a change order or changed condition can have on that portion of the contract work that is not directly affected by the change (6). Though hard to establish, ripple is compensible if additional costs were incurred due to execution of the change.

3.7 THE AMERICAN INSTITUTE OF ARCHITECTS PROCESS

It is quite common for the American Institute of Architects (AIA) standard contract documents to be incorporated into most privately funded construction projects (13). Looking at the General Conditions of the Contract for Construction, AIA Document A201, it clearly explains the rights and responsibilities of the contracting parties when incorporating changes into the contract. It also stipulates appropriate dispute procedures if the contracting parties can not agree on the changed condition. The following subparagraphs discuss the procedural steps in the AIA process for disputed changes.

3.7.1 Issuing A Change Directive

Under AIA document A201, the owner has the right to order changes to the construction work as long as it remains

within the scope of the project. The contractor is obligated to perform the changed work whether the parties agree over the compensible value of the additional work (13). When agreement on an equitable adjustment can not be reached between the owner and contractor, the General Conditions stipulate that the architect shall judge the compensibility of the change. Subparagraphs 7.3.6 and 7.3.8 read in part:

> ...the adjustment shall be determined by the Architect on the basis of reasonable expenditures and savings of those performing the work attributable to the change, including in the case of an increase in contract sum, allowance for overhead and profit .... if the Owner and Contractor do not agree with the adjustment in the Contract Time or in the method for determining it, the adjustment or the method shall be referred to the Architect for determination (3-15).

Pending resolution of a dispute, the contractor is required under subparagraph 4.3.4 to continue to diligently pursue completion of the contract work (3).

3.7.2 Decision of the Architect

Paragraph 4.3 of AIA Document A201 stipulates the procedures that must be followed when a disputed claim arises. Under the AIA rules, the party asserting the claim must present the facts of the claim in writing, "within 21 days after occurrence of the event leading to the Claim or within 21 days after the claimant first recognizes the condition giving rise to the claim, whichever is later" (3-11). The party to the claim is also responsible for substantiating the claims validity (13).

Claims must first be reviewed by the architect for their merit as a condition precedent to arbitration or litigation of a claim unless:

1. the position of Architect is vacant,
2. the Architect has not received evidence or has failed to render a decision within agreed time limits,
3. the Architect has failed to take action required under Subparagraph 4.4.4 [written notice of decision] within 30 days after the Claim is made,
4. 45 days have passed after the Claim has been referred to the Architect, or
5. the Claim relates to a mechanics lien (3-11).

Under paragraph 4.4, After receiving a claim, the architect must take one or more of the following actions within 10 days:

1. request additional supporting data from the claimant,
2. submit a schedule to the parties indicating when the Architect expects to take action,
3. reject the Claim in whole or in part, stating reasons for the rejection,
4. recommend approval of the Claim by the other party
5. suggest a compromise (3-12).

3.7.3 <u>The Disputes Process</u>

The disputing party has 10 days to notify the architect if the claim remains contested following the architect review (3). The architect is then responsible for providing a final decision regarding the dispute within 7 days (3).

This decision is binding on the parties subject to review as outlined in the arbitration clause of the contract (3).

3.7.4 Arbitration

The American Institute of Architects has incorporated an arbitration clause into the AIA General Conditions of the Contract for Construction. Paragraph 4.5 of Document A201 stipulates that arbitration shall be used for dispute resolution according to the American Arbitration Association Construction Industry Arbitration Rules (3). Notice of demand for arbitration must be in writing within 30 days of receiving the architects final decision (3).

Arbitrated awards may be subject to judicial appeal according to the applicable federal and state laws of the court having jurisdiction over the dispute (3). A few states do not enforce arbitration clause requirements unless an award has already been made by an arbitration board (16). However, in most states and under the Federal Arbitration Act, appeal procedures are not available. In fact, most statutes make arbitration mandatory and binding on the contracting parties (16).

3.8 EFFECTIVENESS OF THE AIA CLAIM PROCESS

The effectiveness of the AIA claims procedures for settling disputes and minimizing litigation appears to be a point of contention within the construction industry. One of the debates held during the ninth annual meeting of the Forum on the Construction Industry, sponsored by the

American Bar Association, looked at the practicality of having the architect act as the initial authority for claims validity before undertaking arbitration or litigation (14). As noted during this discussion by Ross Altman, a Chicago attorney:

> making the architect a claims officer only invites trouble. It is unreasonable to expect the architect to have the knowledge and skill to resolve the numerous types of claims that will invariably arise on any construction project. Moreover, it is unrealistic to expect the architect to act completely impartially (14-31).

Dale Ellickson, senior director of AIA's documents program responded in kind. Lunch paraphrased his remarks by stating:

> The role of the design professional as a quasi-arbiter is supported not only be long experience, but more pragmatically by the logic that the design architect or engineer is most familiar with the scope and intent of the project. Bringing in a third-party also would be more costly and time-consuming. Allowing the on-site architect or engineer to handle this function permits the disposition of small problems that could easily become large problems if left to the end of the project (14-31).

Though both parties appear to have some valid points, selecting the dispute resolution method to be employed on a contract based on cost should not be the only consideration looked at as implied by Ellickson. The cost associated with arbitration is insignificant as compared to the expenses that both parties will incur when undertaking legal recourse.

Discussing the effectiveness of the AIA method, Heyer perceives that this method of dispute resolution is viewed with skepticism by the construction industry as being fair and reasonable. He notes that within the contracting community as a whole, "very few contractors believe that the Architects act independently of the Owner in making these [change orders, time extensions and claims] decisions" (12-7). Heyer's perceptions are probably correct. With that in mind, the current AIA procedures for dispute resolution appears to be an ineffective tool for fighting disputes.

CHAPTER FOUR
A LEGAL FOCUS ON THE ARBITRATION PROCESS

4.1 INTRODUCTION

Arbitration was established as a method to resolve contract disputes without having to enter the litigation arena. Though the mechanics used for dispute resolution are somewhat different between these two systems of justice, arbitration procedures are not completely divorced from the judicial system (16). Arbitration supplements but does not replace the legal authority of the courts. The courts are called upon when enforcement of an arbitration clause is required. They also enforce the awards made by the arbitration board if they are not complied with voluntarily since the arbitration board has no enforcement authority (16). The primary difference of arbitration over the court system is its ability to settle construction disputes without the need to undertake a long, exasperating and expensive litigation process.

4.2 THE DEVELOPMENT OF THE ARBITRATION PROCESS

Prior to the 1920s most judicial courts were not supportive of arbitration as a method for settling contract disputes (16). As a rule, arbitration agreements were judged to be unenforceable under common law (16). Often time the courts undermined the process's ability to properly

function and limited contractual enforcement only to those arbitrations that has already made a ruling (16). Other times the judicial system would not uphold a contract requirement directing the parties to arbitrate stating that the clause was an invalid contract requirement (16). Some courts allowed revocation of the agreement by one of the contracting parties if done prior to award (16). Others limited award damages for contractual breach of a contract when a party failed to arbitrate according to the requirements (16).

The courts' attitude about using arbitration for dispute resolution began to improve when many of the states legislative bodies enacted statutory regulations enforcing arbitration requirements in the early 1920s (16). Sweet states these arbitration statutes where important for accomplishing the following objectives that have been fundamental to the success and development of the arbitration process:

1. Made agreements to submit future disputes to arbitration irrevocable.
2. Gave the party seeking arbitration the power to obtain a court order compelling the other party to arbitrate.
3. Required courts to stop any litigation where there had been a valid agreement to arbitrate a pending arbitration.
4. Authorized courts to appoint arbitrators and fill vacancies when one party would not designate the arbitrator or arbitrators withdrew or were unable to serve.

5. Limited the court's power to review findings of fact by the arbitrator and her application of the law.

6. Set forth specific procedural defects that could invalidate arbitral awards and gave time limits for challenges (16-672).

Favoritism toward arbitration has since grown within the legal community out of a perceived need to expedite resolution of contract disputes, to mitigate legal expenses and to relieve an already overburdened court system of contractual law cases (16). For example, in the case of Spence versus Omnibus Industries, the court revealed their approval of arbitrating disputes in place of litigation when it stated:

> The law favors contracts for arbitration of disputes between parties. They are binding when they are openly and fairly entered into and when they accomplish the purpose for which they were intended.
>
> * * *
>
> Our trial courts are clogged with cases, many of them involving disputes between contracting parties. One of the principal purposes which arbitration proceedings accomplish is to relieve that congestion and to obviate the delays of litigation (16-673).

4.3 ENFORCEABILITY OF ARBITRATION CLAUSES

Presently the federal government and nearly every state has enacted laws that encourage and enforce arbitration when the agreement is freely entered into by both contracting parties (16). These laws address the responsibilities of contracting parties to arbitrate when bound by an arbitration clause in the contract (16). However, the courts carefully scrutinize arbitration clauses when brought to court under protest and their record of upholding

arbitration requirements has varied somewhat (16). This is especially true when the requirement to arbitrate a dispute is undisclosed or is forced upon one of the parties through its incorporation into an adhesion contract (16). An adhesion contract is one in which the terms of the agreement are largely dictated by one party and merely adhered to by the second party.

The court may require proof that both parties knew of the intent and understood the consequences of a contract containing an arbitration clause. As pointed out by Sweet, contractor's may unknowingly sign a contract that contains an arbitration clause due to the many layers of references incorporated into contract specifications (16). They may also not clearly understand the ramifications of the dispute clause on their ability to litigate a claim because of these confusing specifications. He notes:

> An owner who uses AIA documents will sign the Basic Agreement, A101, which states nothing about arbitration but incorporates A201, the General Conditions, into the Contract Documents. To complicate the process, A201's arbitration clause is among a number of provisions in Art. 4 captioned "Administration of the Contract." Even more difficult for the unsophisticated owner, ¶4.5.1 requires arbitration in accordance with Construction Industry Arbitration Rules of the American Arbitration Association (CI Rules). These formidable rules are not included in the Contract Documents (b, p. 678).

4.4 THE LEGALITY AND VALIDITY OF ARBITRATION

A party to the contract may feel it is not in their best interest to arbitrate and desires to break this contractual requirement. Under these circumstances they

usually look for a way to attack the validity of the arbitration agreement (16). Cases brought before the courts to invalidate arbitration agreements include reasons such as fraudulent procurement, unconsionability, or that it lacks mutuality (16). Various courts have sided both for and against the plaintiff in these cases depending on the facts brought before them. However, it is plainly the opinion of the judicial system to leave arbitration clauses in tack unless significant facts can be brought to bear which question the fairness or reasonableness of the clause to both contracting parties (16).

4.5 ARBITRABILITY AND TIMELINESS OF CLAIMS

Two other commonly protested issues regarding arbitration address the jurisdiction and timeliness of the process (16). Court decisions responding to these two issues have also varied somewhat based on the court's perception of arbitration and the interpretation made of the arbitration clause in the contract (16). As an example, court decisions have differed significantly when determining if liquidated damages, aesthetic quality or tort claims fall within the preview of arbitration (16). The legal embracement of arbitration, including the implied terms of the agreement, can therefore differ significantly from jurisdiction to jurisdiction (16).

Decisions handed down by an arbitrator are sometimes voided by the courts if it has been determined the

arbitrator exceeded his jurisdiction (16). Nevertheless, courts that favorably support the underlying principles of arbitration usually will not narrowly interpret arbitration clauses to deny settlement of a particular contract dispute (16). For example, "one court noted that over technical judicial review of arbitration awards on the basis of the scope of the arbitrator's authority can frustrate the basic purpose of arbitration" and denied relief to the plaintiff (16-676). The proceeding will generally be upheld and enforced if the descending party has agreed to arbitrate in the first place (16).

In summary, Justin feels the, "judicial resolution of the jurisdictional question is likely to be influenced by the court's attitude toward arbitration, the relative bargaining power of the parties, and the apparent appropriateness of arbitration for the particular dispute" (16-677). Courts tend to be unwilling to evaluate a question of jurisdiction and will usually enforce the findings of an arbitration board if the award has already been made (16).

Timeliness of the demand for arbitration is another issue that has generated some legal review in the past. Contract arbitration requirements often times state that the demand for arbitration shall be made in a reasonable time (16). However, determining what is considered a reasonable time to demand arbitration is very subjective. For example, the American Institute of Architects Document

A201 states the requirements for making a timely request for arbitration. Specifically, decisions of the architect must be appealed to arbitration within thirty days of the decision (3). Other disputes must be submitted within a reasonable time for examination by the arbitration process (3). Again, defining what is considered to be within a "reasonable time" is questionable. Several legal suites over the timeliness of arbitration requests have generated various determinations by the courts. As with the question of arbitrability, legal decisions over issues involving timeliness are likely to be influenced by the courts' perception and attitude toward arbitration, the appropriateness of arbitrating the particular dispute and the equity of the process to both parties (16). Therefore, to avoid protests based on an issue of timeliness, it is preferred to specifically state in the contract what is considered a reasonable time to submit a dispute.

4.6 COMPARING ARBITRATION TO LITIGATION

One of the primary differences between arbitration and litigation as a method of dispute resolution is that arbitration is voluntarily agreed to be used to help settle differences before a dispute even occurs. Arbitration reduces the risk of claim escalation and time delays to the contract parties typically associated with litigation. Arbitration is by and far a quicker and more cost effective method of resolving contract disputes.

Though the American Arbitration Association (AAA) is a non-profit organization, the initial cost of filing for arbitration greatly exceeds that associated with filing a legal suite (16). Under CI Rules, the cost for filing a claim or counter claim under arbitration is based on the size of the claim with $300 set as the minimum fee (16). The size of the fee can become exorbitant as the cost of the claim increases. For example, an abbreviated scale of arbitration fees assessed for a claim is provided as follows:

Claim Amount	Filing Fee
$25,000	$750
$200,000	$2,250
$200,000 to 5 million	$2,250 plus 1/4% of the excess over $200,000
Over $5 million	$14,250 plus 1/10% of the excess over $5 million (16-694)

This AAA fee is due sixty days after filing or before the first date of the hearing, whichever occurs first (1). For arbitrated hearings, the contracting parties are also responsible for all the costs associated with the hearing including the arbitrator(s) fees, clerical fees and expenses associated with renting a hearing room to holding the hearing (16). In comparison, court costs are provided free of charge as a public service to the litigants.

Arbitrations are primarily intended to resolve two party disputes. Its abbreviated format is not suited for multiple party claims and counterclaims due to their

complexity. For this reason multiple party claims are not usually handle by arbitration. Joinder and consolidation of a claim are much more easily accomplished through the legal system (16). The courts are well suited and experienced in resolving multiple party suites that require an extensive amount of time to prepare for and complete.

The legal process of "discovery" is time consuming and costly. Discovery is the, "process by which attorneys in litigation can obtain evidence from the other party to prepare for the hearing" (16-694). Arbitration allows for discovery in a limited form to avoid delaying the hearing. Under the judicial system, discovery is a laborious and lengthy procedure and considered a major step in the litigation process.

Arbitration has the advantage of speed and cost effectiveness over litigation. Arbitration does not require the parties be represented by legal counsel as in the judicial system. Therefore, arbitrated hearings are not slowed down by attorneys and the complicated rules of discovery and evidence that can drag litigation on for an excessive amount of time (16).

Transcripts of the hearings are also not required for arbitrated hearings, saving both time and money to complete the process (16). The speed and simplicity of an arbitrated hearing not only results in quicker decisions but reduces the expense the parties must absorb.

Arbitrators are not educated in the field of law nor have the experience of a trial judge in hearing legal disputes. However, they often times possess the technical and field experience to better understand the mechanics of the dispute (16). Arbitrator's are also not compelled to follow legal precedence in their decisions as is commonly done in the court system (16). Awards are more apt to be based on technical as well as the legal merit.

Litigated hearings are held at the court of jurisdiction located at the principal city nearest to where the lawsuit was filed. Contrary to this, arbitrated hearings can be held anywhere that is convenient to all the parties (16). Furthermore, site visits to investigate the dispute are common in arbitrated hearings but difficult to arrange with court cases (16).

Arbitrated hearings are closed to the public and justification for an award is not required to be given by the board members (16). Litigated cases, on the other hand, are open to the public and awards are often followed by a lengthy legal explanation of the decision handed down by the court.

Lastly, legal decisions can be retried by the appellate court based on an error of law or if there was no evidence to support the findings of fact. Arbitrated decisions are not appealable unless associated with a procedural problem or misconduct on the part of the arbitrator (16). In fact, Justin notes that arbitrated awards containing an error of

law have not been successfully overturned by the courts in the past when he states:

> One court stated that the court will not inquire whether the determination [award] was right or wrong. Another stated errors of fact or law are not sufficient to set aside the [arbitrated] award. Another stated that an error of law was not reviewable unless the arbitrator gave a completely irrational construction to the provision in dispute. Another stated that honest errors were not reviewable" (16-690).

In summary, though the court system was possibly used as a model when initially establishing arbitration procedures, the brevity of arbitration attained by minimizing the number of procedural steps was intentionally incorporated into this dispute resolution process. Without being able to expeditiously handle disputes by limiting the procedural scope, the main focus of expediency and cost effectiveness of the arbitration process would be lost.

CHAPTER FIVE
THE ARBITRATION PROCESS

5.1 INTRODUCTION

This chapter addresses the dispute resolution process through arbitration. Third party disputes resolution can encompass a broad or narrow spectrum of contract issues under dispute. If an arbitration clause is incorporated into the contract documents, the scope of what can be disputed under arbitration is defined within the general conditions of the contract specifications.

Arbitration is used to resolve disputes that are broad in nature and have historically been resolved through the litigation process. Until 1966, arbitration using the American Institute of Architects (AIA) documents was either completed informally between the parties or through the American Arbitration Association (AAA) commercial rules (1). These rules caused delays and procedural problems since they were not geared toward the requirements of the construction industry (1). In 1966, the AAA adopted the Construction Industry Arbitration Rules which are now supported as a forum for dispute resolution by fourteen national construction associations (1).

5.2 DEVELOPING THE ARBITRATION CLAUSE

Dispute resolution through the arbitration process can be made mandatory by incorporating this requirement into the contract documents. If an arbitration clause is not included in the contract documents, parties can still mutually agree to arbitrate a dispute through the AAA by submitting a signed statement of their intent (1). With the inclusion of an arbitration clause within the contract documents, the contracting parties acknowledge resolving contract disputes through arbitration upon signing the contract (16).

Usually the arbitration clause of the contract is based on a standardized set of rules developed by a leader in the construction industry such as the Construction Industry Arbitration Rules of the American Arbitration Association (16). The clause, however, is not required to be drafted around any particular set of rules. Though state statutes sometimes do mandate particular requirements to be incorporated within the arbitration clause, modern arbitration statutes usually only require that the agreement be in writing (16).

Tailoring of standard arbitration rules may be desirable to fit the needs of the contracting parties. For example, the party developing the arbitration clause must know the desired extent of authority to be given to the arbitration board. More specifically, Sweet suggests the

contracting party may desire to modify a standard arbitration clause to include:

1. Limiting arbitration to factual disputes such as those involving technical performance standards or eliminating arbitration of other types of more "legal" disputes such as termination
2. Specifying the place of arbitration.
3. Providing a designated person or persons as arbitrator or arbitrators.
4. Limiting arbitration to claims not exceeding a designated amount or percentage of the contract price.
5. Limiting disputes to those that occur while the work is proceeding with an expedited one-person panel.
6. Permitting consolidation of separate arbitrations.
7. Providing a right to discovery.
8. Limiting the award to the most fair of the last proposals or an amount between the two final proposals of the parties.
9. Eliminating the use of attorneys.
10. Making the award "nonbinding" (16-696).

Sweet clearly points out, however, that the more complicated the arbitration clause becomes, the more burdensome it may be to reach a quick conclusion of the dispute (16). The greater the variables, the greater the time and cost associated with the performance of an arbitration hearing (16).

Though not all are required for every arbitration, some of the more common steps in the arbitration process under the Construction Industry (CI) Arbitration Rules of the AAA

include; holding an administrative conference, selecting the arbitrator(s), selecting a location for the hearing, holding preliminary hearing procedures, completing the arbitration hearing, arbitrating awards, arbitration enforcement and the allowed scope of judicial review (16). These steps will be discussed further in the following sections.

5.3 HOLDING AN ADMINISTRATIVE CONFERENCE

The AAA may schedule an administrative conference before the appointment of the arbitrators if requested by the parties or if the disputes are large and complex (2). This informal meeting between the parties and an AAA representative is used to establish a procedural process for the arbitration. Topics of discussion typically include:

1. A brief statement of the dispute and issues to be resolved.
2. Specify the amounts of claims and counterclaims.
3. Stipulation of uncontested facts.
4. Schedule for the exchange of information, including any reports from experts.
5. Lists of witnesses, including biographies of expert witnesses and outlines of testimony.
6. Estimated length of case and schedule for hearings.
7. Number of copies of exhibits to be made.
8. Briefs.
9. Conduct of hearings and closing remarks.
10. Arbitrators' directives for resolving disputes over exchange of information (2).

Completing these procedural steps before the arbitration helps ensure the process is completed in an orderly, expeditious manner (2).

5.4 SELECTING THE ARBITRATOR(S)

The method used to select the arbitrators is defined by the arbitration clause of the contract (16). Typically, arbitrators are selected by the contracting parties after award of the contract rather than by being identified within the arbitration clause (16). The joint selection of the arbitration board assures both parties an impartial decision will be made when resolving disputed matters. The parties must be confident that awards will be based solely on the facts and the expertise of the panel.

This actual selection process can vary somewhat from contract to contract depending on the wording of the arbitration clause. The clause can stipulate that each party name an arbitrator with the third being jointly selected by the previously named board members. Some contracts require the parties select only two members of the arbitration panel with the selection of the third member to be made only to break a deadlocked decision (16). On smaller contracts, the clause may stipulate only using one arbitrator to resolve disputes (16). Some clauses identify a known neutral party, such as the American Arbitration Association, to designate the arbitrators when the parties can not mutually select the board (16). In this instance

the AAA will name a particular panel of qualified members from which the parties may be able to mutually select the arbitrator. If they still can not agree, the AAA will assign arbitrators to preside over the dispute hearings (16). Normally, unless the arbitration clause states or the parties agree otherwise, a board of three arbitrators is used to evaluate claims (16).

Some contracts follow the AAA guidelines wherein arbitrators are appointed to the board by the AAA after a demand for arbitration is made (1). The board appointments are based on a short-list selection of nominations made by the disputing parties from the list of possible candidates the AAA has named (1).

5.5 SELECTING A LOCATION FOR THE HEARING

The arbitration clause does not usually identify a site where the hearing will take place. This is to allow for joint selection of a mutually neutral location (16). Any location is considered adequate as long as its selection is reasonable, cost effective, expeditious to resolving of the dispute and mutually neutral. For example, the site may be selected for its proximity to the actual jobsite to facilitate site visits during the hearings. The AAA is usually authorized to designate the location where the hearings will be held if the contracting parties can not agree on a mutually neutral site (16). If the parties are bound by the AAA arbitration rules, the time and place for

the arbitration is automatically selected by the AAA after consulting with both parties to determine a mutually convenient time and place (1).

5.6 PREHEARING PROCEDURES

Under the AAA rules, the party who initiates the dispute action submits a notice of the intent to arbitrate stating the reasons for the dispute, the amount of the claim and the remedies sought by the party (1). The initiating party is responsible for paying a fee based on the amount of the claim to cover the cost of the proceedings (16).

Depending on state statutes controlling the arbitration process or for extremely large or complicated claims, a short pretrial "discovery" period may be necessary as a method to aid both parties in their mutual understanding of the issue being disputed (16). Discovery allows the contracting parties to examine witnesses or documents held by the other. This gives both parties a chance to obtain the facts pertinent to the dispute and evaluate the other's position (16). In some instances, during the pretrial discovery process additional information or facts surrounding the debated issue may clarify the dispute allowing both parties to reach a mutually acceptable settlement without the need to arbitrate.

Though not required, before the arbitration hearing both parties may consider forwarding the other an advance copy of their case facts, their interpretation of those

facts and their justification for their position (16). Justin suggests this advance submission will narrow the scope of the dispute during the proceedings by eliminating issues not relevant to resolution of the dispute (16). This may lead to a more expedient settlement saving both parties time and money (16).

However, the beauty of arbitration lies in its ability to quickly and efficiently respond to conflict. Sweet clearly notes that the parties must be careful not to unintentionally undermine the ultimate goal of expediting, simplifying and minimizing expense of the conflict resolution process (16). Incorporating too many of the procedures common to the legal system into arbitration can limit its effectiveness. Good judgment and common sense focused on the goals of arbitration should be used as a benchmark against over complication. For this reason, representation by legal council may be counter productive to the process.

5.7 COMPLETING THE ARBITRATION HEARING

Typically arbitration clauses do not describe the procedures that must be followed for holding an arbitration hearing (16). Often times, statutory law, arbitration associations or trade groups provide general guidelines by which the arbitration board uses to conduct a hearing (16). In the absence of any guidelines, the arbitration board determines how the hearings are to be conducted. The

following examines those procedures commonly employed in most arbitration hearings.

5.7.1 Identifying The Arbitration Member(s)

In some instances the arbitration clause does not require selection of the arbitrator(s) until a dispute has been presented in writing (16). In this instance, selection of the arbitrator(s) must be made before any action can be taken to resolve the grievance. It is the responsibility of both parties to quickly identify mutually acceptable arbitrator(s) so the hearings can expediently proceed.

5.7.2 Waiving Formal Hearings

The contracting parties may agree to have the arbitration board review a particular dispute based solely on each other's written statements (16). These statements summarize the issues and facts surrounding the dispute as each party sees it. The contract documents or any other written documentation that may shed some light on resolving the conflict is forwarded with their written statements (16). For smaller disputes, this method of resolution can save time and money for both parties by minimizing their efforts to complete the dispute resolution process. Even still, the arbitrator has the right to request a hearing be held if the contracting parties do not provide sufficient information for the board to reach a decision (16).

5.7.3. Scheduling The Hearing

The arbitration board should attempt to meet as soon as possible after the notice of a dispute is forwarded. Sufficient time should be allowed, however, for both sides to properly prepare their case before the date of the hearing. Based on the complexity of the claim, this should take into account the time that may be needed to obtain the professional services deemed necessary to present their position or complete any testing needed to substantiate their case. Disruptions to the arbitration process, such as a request for postponement or recess of a hearing, can be granted by the board if there is reasonable cause for the request (16).

5.7.4 Professional Conduct of The Arbitrators

The parties should be allowed to question the arbitrators at the beginning of the hearing to confirm their impartiality toward the dispute (16). The arbitrators should openly disclose any information that could present even the appearance of favoritism.

The arbitrators may open the hearings by stating the oath they are bound by if required by state or federal arbitration statutes (16). Conduct of the hearings should be geared toward honesty, professionalism, fairness and impartiality. Even an erroneous appearance of favoritism to one side can result in post award protests, resubmission of the claim for review or follow on litigation.

5.7.5 Refusal To Attend Hearings

Should one of the parties to the contract refuse to attend the hearing, the arbitration should still proceed as scheduled. The party in attendance will be given the opportunity to present his position to the arbitration board (16). Any written information provided by the protesting party will be reviewed before making an award (16). The arbitrated award will be based solely on the evidence before the arbitrator at the conclusion of the hearing (16).

5.7.6 Opening Remarks

It is up to the discretion of the arbitration board whether they will permit the parties in dispute to open the hearing with some brief remarks (16). Sometimes opening remarks can be beneficial for very large or complex disputes. These statements may shed some light on the relevant facts of the dispute and help the arbitrators focus on the real issue at hand (16).

5.7.7 Evidence & Subpoena Rights

Neither party desires to present information or witnesses that may weaken their case during the hearing. Without the authority to require the contracting parties or known witnesses to cooperate, the arbitration board would be ineffective. For this reason state arbitration statutes typical empower the arbitration board with the authority to

subpoena an individual to testify in the hearings or to subpoena other evidence relevant to reconciliation of the dispute (16).

5.7.8 Evidence Rules

The formalities of evidence rules associated with the court system do not apply to arbitrated hearings (16). It is the responsibility of the arbitration board to make a determination of the relevance of the evidence presented to resolve the dispute (16). Evidence and testimony should be submissible as long as the hearing is not sidetracked or let to meander off on issues not relevant to resolving the dispute (16). Any evidence seen as irrelevant should be discarded and the discussion redirected to the main issues of the claim.

Written documentation that is presented by either of the contracting parties must also be relevant to resolving the dispute to be submitted as evidence into the hearings. These documents can be reviewed for their authenticity but the formalities of document verification common to the court system do not apply in the arbitration process (16).

5.7.9 Witness Testimony

Listening to testimony from both parties to the contract is an important step in the arbitration process. Awards made without the opportunity for the parties to present witnesses to testify in their behalf can result in a protest and subsequent appeal of the board's award decision

to the court (16). Unlike the legal system, arbitrators are not bound by the cross examination rules of the court. For example, leading questions are permitted to be used by the defense (16). This method of cross examination can be useful in an arbitration hearing, "to test the credibility of the witness and expose dishonest or inaccurate statements" (16-686). The arbitrator also has the flexibility to allow the testimony be presented either through questions and answers or by allowing the witness the freedom to describe in his own words the circumstances leading to the dispute (16).

5.7.10 Site Visitation

The hearings should be located to afford the arbitrators the ability to visit the construction site (16). In some instances the hearings are held at the construction site to simplify site investigation. The arbitrator can make a site visit under his own volition or if requested to do so by either of the parties to the contract (16). However, "Section 31 of the CI Rules requires that all evidence be taken in the presence of all the arbitrators and all the parties, except where any of the parties is absent in default or has waived the right to be present" (16-686). Therefore, both parties must be offered the opportunity to be present when the board completes a site inspection as part of the formal arbitration hearing (16).

5.7.11 Documenting The Hearing

The arbitration clause usually does not require that the hearings be recorded or documented in any fashion (16). Sometimes the proceedings will be transcribed to document the events that transpired during the hearings (16). This can be useful as a future reference should a protest arise over the exact testimony given by a previous witness. It also serves as an accurate documentation of the proceedings if reference to a specific issue is needed during deliberation. However, transcribing the hearing requires additional time and money to complete. Its benefits should be weighted against the cost and time incurred.

5.7.12 Reopening A Hearing

If an award is pending, either party has the right to request the hearing be reopened to examine newfound evidence (16). The arbitration board has the right to reopen the hearing if, in their judgment, the additional evidence could have a bearing on the outcome of the dispute (16). The arbitrators may also reject the motion to reopen the hearing if, in their opinion, the evidence is irrelevant to the dispute or was readily available at the time of the initial hearing (16). The arbitrators must make a judgment call whether the new evidence is substantive enough to warrant reopening the hearing. Since timeliness of action is one of the major objectives of the arbitration clause, reopening hearings should be scrutinized.

5.8 ARBITRATED AWARDS

At the conclusion of the hearing, the arbitration board again reviews all relevant documentation and weighs the relevant facts before making an award. Usually it is not required that a unanimous decision be reach by the board to make an award unless specifically stated in the arbitration clause or by the rules under which the hearing is being held (16).

The award remedies available to the arbitration board are usually identified in either the arbitration clause or within the rules used to conduct the arbitration hearing (16). Often times these guidelines are vague, allowing the arbitration board to bestow the award based solely on the premise that it is, "just, equitable and within the terms of the agreement between the parties" (16-688). For this reason, cash settlements or performance directives are usually based on the actual or anticipatory loss incurred by the prevailing party.

The award itself can be based on simplistic formulation of a cash or performance settlement. The time frame under which the award must be made is noted in the rules under which the hearing is being held. As an example, the AAA rules require the arbitration board to make a prompt decision and subsequent award, "no later than thirty days from the date of closing the hearings, or if the oral hearings have been waived, from the date of transmitting the final statements and proofs to the arbitrator" (16-689).

The award must be made in fourteen days under AAA expedited proceedings (1). The board's failure to comply with the time frame set for determining the award may result in voiding the board's authority (16).

It is not customary for the arbitration board to justify their award decision by providing a written opinion with the award (2). However, the board has the discretion to do if it sees fit or if requested by the parties (2). This opinion may include the findings of fact and the breakdown of the amounts awarded (1).

Sweet suggests that providing an opinion at the conclusion of the arbitration may clear up any misperceptions of the equity of the judgment and may minimize the desire to pursue legal recourse (16). Giving an explanation for the award also has its drawbacks. The parties to the dispute will have to bear the additional time and expense associated with the effort the arbitration board will require to complete the written opinion (16). Difficult disputes requiring discretionary calls on the part of the arbitration board may be difficult to clearly defend. Providing a questionable defense for the decision may leave the dispute open to additional challenge if the disgruntle party disagrees with the rationale used to arrive at the award. Sweet suggest that a compromise may be to provide only a brief explanation of the award at its announcement (16). This method serves to avoid additional

costs and maintains the goals of the arbitration process of expediency and cost effectiveness (16).

Though not specifically entitled to award attorney's fees under the AAA rules, some state arbitration statutes do grant this relief to the prevailing party (16). The board may also assess the fees associated with the hearing equally between the parties in dispute or in favor of one of the parties (16).

5.9 AWARDS ENFORCEMENT

The power of the arbitration board terminates with making the award (16). The arbitrated decision can not be changed unless both parties desire to reopen the case or state and federal statutes provide otherwise (1). However, the arbitration board has no enforcement authority to coerce the parties to comply with the arbitrated decision. If the losing party refuses to perform according to the decision made at the hearing, enforcement of the award is left to the judicial system (16).

5.10 JUDICIAL REVIEW OF ARBITRATED AWARDS

The requirements for challenging the validity of the arbitrated award through the judicial system are usually identified in the state arbitration statutes (16). The Federal Arbitration Act and the Uniformed Arbitration Act, both very similar in content, have been used by most states as guidelines for establishing the rules by which arbitrated awards can be set aside (16). As with the Uniformed

Arbitration Act, most state arbitration statutes permit an award to be vacated where any of the following exists:

1. The award was procured by corruption, fraud or other means;

2. There was evident partiality by the arbitrator appointed as the neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

3. The arbitrators exceeded their powers;

4. The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to provisions of Section 5, as to prejudice substantially the rights of a party; or

5. There was no arbitration agreement...and the party did not participate in the arbitration hearing without raising the objection (16-689).

Further, as with the Uniformed Arbitration Act, most state laws allow modification or correction of an award within ninety days after delivery of a copy of the award where any of the following exists:

1. There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

2. The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

3. The award is imperfect in a matter of form, not affecting the merits of the controversy (16-689).

As evident, the grounds available for setting aside an arbitrated award are very limited in scope. The right to judicial review must be based on misconduct or a procedural

error that occurred during the hearing and not solely to appeal the award (16). This is clearly evident as Sweet writes:

> One court stated that the court will not inquire whether the determination (of the board) was right or wrong. Another stated that errors of fact or law are not sufficient to set aside the (arbitrated) award. Another stated that an error of law was not reviewable unless the arbitrator gave a completely irrational construction to the provision in dispute. Another stated that honest errors were not reviewable (16-690).

The purpose of limiting the scope of judicial review to procedural errors appears to be to avoid frustrating the intended purpose and primary advantages of the arbitration process (16). This has been accomplished by the court by limiting the availability of the court system to appeal arbitrated decisions. The idea of limiting judicial review also serves to encourage the parties to resolve disputes at their level since they are aware that legal recourse is, in most cases, not possible (16).

CHAPTER SIX
OTHER TYPES OF DISPUTES RESOLUTION FORUMS

6.1 INTRODUCTION

The purpose of this chapter is to briefly explore various forms of dispute resolution alternatives available for implementation in construction contracts. Though the list is not all inclusive, it is representative of the diversity available to contracting parties desiring to incorporate a dispute resolution clause into a construction contract.

6.2 MEDIATION ASSISTED NEGOTIATIONS

Mediation is a voluntary process which involves using a single moderator to assist the parties resolve their dispute through direct negotiation (1). The mediator participates impartially, serving as an advisor and consultant (1). Mediation does not include holding formal hearing and making subsequent award (16). The settlement must be mutually acceptable to both parties.

If used to supplement arbitration, mediation occurs initially when it becomes evident the contracting parties can not come to terms over the dispute (1). The following contract provision, written by the American Arbitration

Association for incorporation into contracts where mediation is to be employed, summarizes the mechanics of mediated disputes:

> If a dispute arises out of or relates to this contract, or the breach thereof, the parties agree first to try in good faith to settle the dispute by mediation under the Construction Industry Mediation Rules of the American Arbitration Association, before resorting to arbitration. Thereafter, any remaining unresolved controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered in any Court having jurisdiction thereof (b, p. 697).

Either of the parties may withdraw from the mediation process at any time (16). Anything which has transpired during the proceedings can not effect the rights of either party nor can it be used to prejudice their positions if arbitration or litigation is to follow (16).

This form of dispute resolution is more cost and time effective than arbitration if the parties can reach an agreement without having to arbitrate. This is true since, under mediation, there is no need for prehearing preparation or to conduct a hearing as required by arbitration (16). Even if not fully successful, the mediation may be able to resolve some of the disputed issues making the subsequent arbitration process less cluttered with insignificant matters. In the long run, this may help to clear the way for a more expedient arbitration hearing. As an added incentive, pursuant to Section 10 of the CI Arbitration

Rules, if the disputing parties pending an arbitration agree to use the AAA arbitration rules, they incur no additional administrative fee to initiate mediation proceedings (1).

6.3 FACT-BASED MEDIATION

This disputes forum provides the parties with an individual who can assist both as a mediator to help settle the dispute bilaterally or to provide an advisory ruling when settlement is not achievable (16). Each side presents their facts of the dispute and negotiations are conducted. If a settlement is not reached, the mediator provides a detailed written analysis of the case facts and a proposed settlement to each party (16). He also provides the parties with an assessment of the facts, anticipated judicial outcome and an estimate of the cost to both parties should they desire to proceed to arbitration or litigation (16).

This form of dispute resolution provides both parties with a realistic picture of the expenses and ultimate results that will be achieved through further pursuit of the dispute. Parties are more apt to settle when they are given a clear picture of what is at stake if they let the dispute go unresolved (16).

6.4 AAA EXPEDITED PROCEDURE

The main objective of this method of dispute resolution is streamlining the standard AAA process so that the dispute is resolved in a matter of days. No formal written notice of the dispute is required (16). Appointing the arbitrators

and selecting the location and time for the hearing is expedited (16). Under this procedure, it is required that the hearing be completed within one day of notification of a dispute (16). An additional day of hearings may be held within five days if the arbitrator can show good cause for the requirement (16). The award is required to be made within five business days of the date the hearing closed (16).

If incorporated in the arbitration clause of the contract, the AAA expedited procedure must be used for claims totaling less than $25,000 excluding any interest due and the administrative costs for the hearing (16). However, the parties to the contract can agree to use this method of dispute resolution for any claim regardless of its value (16).

This method of dispute resolution appears very promising for small, uncomplicated disputes. Using AAA expedited procedures for large or complex claims can be counter productive since the time constraints would not allow sufficient time for adequate preparation, testimony, review and award without significantly increasing the potential for an error to be made in the award or award amount. Though they may not occur frequently, errors of this nature can increase the dissatisfaction with dispute resolution process and lead to a desire to pursue litigation.

6.5 MINI-TRIAL

Under mini-trail dispute resolution, the parties mutually select a neutral party advisor or mediator (16). Prehearing discovery between the parties is expedited and hearing briefs are exchanged (16). Hearings are limited to two days and are moderated by the selected mediator (16). Presentations are made to designated executives of both parties not directly involved with the contract who have the contractual authority to settle the dispute (16). If the executives can not come to terms at the close of the hearing, the advisor submits a nonbinding opinion of the dispute based on the facts presented (16). Before pursuing litigation, the executives are given an additional opportunity to settle the dispute after the opinion is released (16). If the dispute does go to court, the details of the mini-trail are not admissible as evidence (16).

6.6 REFEREES AND SPECIAL MASTERS

This method of dispute resolution has become common in California and has been coined as "rent-a-judge" (16). Referees or special masters are individuals appointed by judges to conduct hearings and make awards on contract disputes pending litigation (16). The referees selected by the court are usually retired judges who have significant trial experience (16). Their decisions are generally signed by the appointing judge and stand as if they were the findings of the court (16). The decisions made, as with normal court decisions, are appealable (16).

6.7 SUMMARY JURY TRIALS

This expedited trail method has been developed by the federal trial courts in an effort to save time and money (16). As with a traditional trial, jury selections are made. The members of the jury are not told their decision is non-binding on the parties so as not to affect their judgment during deliberation (16). The lawyers from both sides are allowed to present their client's case, however, no witnesses are allowed to testify (16). Rebuttals follow the initial presentations. The hearings take approximately one day to complete (16).

After the cases are presented, the judge instructs the jury as with a normal trail (16). The jury is then left to make their determination of the dispute. Verdicts of the jury are non-binding and either of the parties can request the dispute be taken to trial.

Though the verdict is non-binding, knowing the opinion of a jury of your peers helps encourage settlement of the dispute without initiating trial procedures. This method of contract disputes resolution significantly reduces the cost and excessive time litigation requires by eliminating the need for lengthy pretrial preparation and presenting witnesses on each parties behalf.

6.8 ADVISORY OPINIONS

This form of dispute resolution consists of having a neutral third party meet with the contracting parties both together and separately (16). Through the information

gathered from the parties, the arbitrator renders a non-binding decision over the dispute (16). The parties can settle the dispute based on this decision or continue to pursue the dispute further.

This disputes resolution process has been somewhat successful in that the parties are given a nonpartisan opinion of the outcome of the dispute if it was to be litigated. Since the finding is non-binding, either party still has the right a court hearing to address the validity of the dispute.

6.9 NONBINDING ARBITRATION

Non-binding arbitration incorporates parts of both the mini-trial and the arbitration process into a dispute resolution technique (16). It is a very abbreviated hearing where both sides present their position before a board of impartial, neutral experts (16). The board makes an oral advisory award after completing the hearing which assesses the merits of the dispute if it were to proceed to trial (16).

This method of dispute resolution provides the parties with a nonbinding opinion of the dispute. It remains the responsibility of the disputants to negotiate a settlement or follow through with litigation.

6.10 STEP-BY-STEP DISPUTES RESOLUTION

This form of dispute resolution was developed by the California Chapter of the Project Management Institute to

help solve the growing disputes problem (6). The Disputes Resolution Clause (DRC) developed by the Chapter recommended a four step procedure for addressing dispute resolution (6). These four steps are as follows:

1. Direct negotiation between the disputants involved (not binding).
2. Mediation between the disputants, with a third-party expert to facilitate early resolution (not binding).
3. Mini-trial, with company officers cross-examining disputants in each other's presence (not binding).
4. Adjudication either by private judging, litigation or arbitration (binding) (6-470).

The first three steps of this process assume that the parties are willfully attempting to reconcile their differences through a nonbinding resolution process. Ideally, the dispute is best settled between the parties at the lowest level where direct negotiations are available for use (6). As each step proves to be unsuccessful, the dispute is redressed to the next higher level of formal hearings (6).

6.11 DISPUTES REVIEW BOARD

Somewhat similar in nature to an arbitration board, the Disputes Review Board process is incorporated into the contract through a contract clause (19). A Disputes Review Board is composed of a small panel of technical experts in the construction field who act as the dispute board members (19). They are mutually selected by the contracting

parties at the beginning of the contract for the project duration (19). Unlike arbitration boards however, these board members are required to make routine visits to the construction site to stay abreast of the project as it is completed (19). The costs associated with the Disputes Review Board process are normally share equally between the contracting parties (19).

When nominating a three member board, both parties select one mutually acceptable, neutral board member (19). These board members in turn nominate the third member of the board who is designated as the chairman of the Disputes Review Board (19).

During the routine site visits, the board members are to be made aware of any pending disputes between the contracting parties so that the board can investigate, review the facts and rule on the merits of the dispute while at the project site (19). In urgent circumstances, the board can be summons to respond to a critical dispute that can not be left unresolved until the next scheduled site visit (19).

Either party to the contract can initiate dispute proceedings (19). Personnel directly involved with the on-site construction perform a major role in presenting each party's position during the hearing (19). The Disputes Review Board listens to each party's position and makes a non-binding determination based on the finds of fact (19).

Either party dissatisfied with the ruling can appeal through the normal arbitration process or judicial system.

Vorster states that there are three primary reasons that Disputes Review Boards have been successful in the past, "firstly, they focus on prevention rather than cure, secondly, both parties to the contract see them as fair and thirdly, they resolve issues on the project at the level of occurrence" (19). One of the primary advantages of the Disputes Review Board is that by making routine visits to the project site, board members become intimately familiar with the project and the problems experienced by both members before they have the chance to escalate.

Vorster also suggests that the routine site visits act as a catalyst to conflict resolution since both parties are more willing to resolve disputes prior to the board's periodic visit than to "air their dirty laundry in public" (19). As a result, many trivial disputes are handled at the field level were they belong before they become major issues of contention.

Vorster further believes that the contracting parties view the Disputes Review Board as being fair and reasonable because it is comprised of mutually selected individuals knowledgeable in the field of construction (19). The contracting parties are more apt to respect and accept the judgment of the board members when ruling on a dispute

because of the arbitrator selection process, the boards technical knowledge and their familiarization with the project through the periodic site visits.

CHAPTER SEVEN
PARTNERING: A COMMITMENT TO COOPERATION

7.1 INTRODUCTION

The Construction Industry Institute has defined the partnering process as used in construction contracts as:

> a long term commitment between two or more organizations for the purpose of achieving specific business objectives by maximizing the effectiveness of each participant's resources. The relationship is based upon trust, dedication to common goals and understanding each others individual expectations and values. Expected benefits include improved efficiencies and cost effectiveness, increased opportunity for innovation, and continuous improvement of quality products and services (10-5.6)

The development of the partnering philosophy for use with construction contracts was generated in response to the perceived need to short circuit the spiraling litigation underway in the construction industry. It has been called, "a breath of fresh air to an industry that is tired of the contention and litigiousness that have plagued the construction process for years" (20).

To be successful, partnering relies on the principals of trust, understanding and mutual respect for each party's role in the construction process (5). It recognizes the risks associated with each other's endeavors and employs harmonious relationships as a means for completing the project. The old sentiment that someone will come out ahead

at project completion is abandoned. There are no winners or losers in partnering since it relies on a "win-win" attitude where everyone benefits from delivery of the final product (21).

Partnering has received great praise for its effectiveness from the construction community. Owners, designers and contractors alike have shared the same initial response that partnering works. It is an effective instrument against the traditional tendency for contracts to be a constant battle ground for disputes and litigation. Several companies including DuPont and Union Carbide have embraced the partnering concept for use in their construction projects and a number of large contracting firms such as Fluor Daniel, Incorporated; Bechtel Group, Incorporated and Brown & Root/Braun actively market partnering (7-12).

Along with the dispute resolution benefits, partnering is believed to reduce or eliminate growth in project cost and time, balances contractual risk more evenly and favors a winning attitude among all the players (20). This chapter focuses on the partnering process as used in the construction industry.

7.2 THE PARTNERING CONCEPT

As previously stated, partnering is based on the basic values of trust and good faith in each other. It returns people to the days gone by when an entrusted handshake was

all that was needed between two parties to confirm their consent and agreement to fulfill a promise (8). It is not a contractual agreement. Contractual agreements forcibly tie the relationships of the parties to legal responsibilities. The partnering commitment, on the other hand, is a pledge freely taken between the contracting parties to live up to the mutually agreed responsibilities. Rather than forcing relationships, partnering is founded on the expressed desire to build better relationships between the parties through mutual understanding, trust, commitment and communication (5). Warner states it best when he said,

> While it [the partnering charter] is not a legally binding document, it represents a document of a higher order than the basic contract provisions. A higher order because it is not followed out of fear of penalty or financial loss but rather out of a feeling of integrity and honor (20).

Through partnering, the parties share a common goal dedicated to ensuring the project is completed with quality, a timely manner and to each ones financial betterment. A jointly developed strategic plan of action is drawn up between the parties for achieving their commitment to the goal of successful project execution. This process of working together for the common good cultivates an environment conducive to the good working relationships needed to be successful (4).

Beck states that, "partnering means embracing risks and responsibilities rather than retreating into a bunker mentality" (7-13). It is playing an active role in

achieving the desired end results (7). Colonel Cowan of the Arizona Department of Transportation has labeled it, "an action oriented success strategy for the 1990's" (4). The goals of partnering are only possible by replacing the old sentiments of mistrust and irresponsibility with an active pursuit of project excellence. The "win-lose" philosophy of the past has generally resulted in everyone losing over the course of the contract (20).

7.3 THE KEY ELEMENTS OF PARTNERING

Partnering is not a contractual requirement but a philosophical approach to how the project can be best undertaken. This approach to contracting must be mutually beneficial and desirable to both contracting parties. Typically, an agreement to partner occurs just after award of the project (5). Once the parties have agreed to partner on a project, the process is initiated with a partnering workshop.

The workshop is set up as a round table forum between the contracting parties where the keys to successful partnering are addressed (5). This includes commitment, equity, trust, the development of mutual goals and objectives, implementation, continuous evaluation and timely response (5). These seven elements are the basic principles by which the success of partnering is founded upon. They

are further defined by the Associated General Contractors of America as follows:

1. Commitment. There will be no commitment between the parties unless there is true commitment from top level management. During the workshop a charter is formed between the parties bonding them to their word. This commitment to each other's endeavors is not a contract but represents a vow of good faith toward achieving each other's mutual goals (5-2).

2. Equity. Mutual goals are jointly developed during the partnering workshop by those who are a party to the contract. Undertaking the project is based upon a "win-win" attitude between the parties to achieve these mutual goals. This represents a fundamental change of approach of past toward a new commitment of fulfilling each other's expectation of completing a successful and equitable project (5-2).

3. Trust. Beck noted that partnering is, "like any marriage, to work requires trust, and it requires allot of hard work" (7-13). Without trust in one another there can be no teamwork. Trust is built upon a true understanding of the other's motives and actions. With trust, healthy working relationships can be fostered

between the parties, opening the lines of communication and understanding (5-2).

4. Development of Mutual Goals and Objectives The partnering workshop serves as a forum for identifying common goals while undertaking the project. Not surprisingly, both the owner and the contractor typically share many common goals. These common goals usually include minimizing paperwork, meeting financial objectives, producing a quality product, timely completion, avoidance of generating documentation geared toward case building for possible litigation, safety, achieving savings through value engineering ideas, avoiding bottlenecks during submittal reviews, quick response to unforeseen or changed site conditions, decisive action to correcting identified errors in construction or design, expedient change order negotiation and execution, prompt payment and litigation avoidance (20).

5. Implementation. Success is achieved not by the plan but by the merits of those who execute the plan. No plan is worthwhile without developing a sound strategy and demonstrating the where-with-all and commitment to get on with it. During the partnering workshop, the parties develop this strategy for achieving their mutual goals. This includes establishing specific remedies for

resolving problems or disagreements that may arise during the project (5-2).

6. Continuous Evaluation. The plan calls for periodic meetings between the parties to evaluate "team" progress toward achieving their mutually agreed upon goals. These periodic meetings ensure the parties stay on course with the plan, are used to evaluate each other's performance and serves as an open forum to air any possible grievances (5-2).

7. Timely Response. In the construction industry it is imperative that jobsite problems are handled expediently. Idle equipment and manpower cost money that no one wants to foot the bill for. Very often, small issues can turn into major problems leading to an increased likelihood of disputes developing between the parties. A lack of decisive and timely action also reduces the confidence level between the parties increasing the risk for problems to escalate. During the partnering workshop, the parties develop a vehicle which encourages resolving issues at the lowest level as quickly as possible. In the event an issue remains unresolved beyond a reasonable time, procedures are developed to bump it to the next higher level in the management chain (5-2).

7.4 THE PARTNERING PROCESS

Partnering can work for any size or type of project and its usefulness is not limited to fixed price competitively bid contracts. It is these types of projects however that partnering appears to be able to maximize its potential since competitively bid projects are more susceptible to claims and litigation.

The partnering process follows no preconceived formula since every project has its own unique qualities (5). The process should be tailored to fit the specific contract and individual needs of both parties entering into the agreement. There are seven basic procedural steps, however, which must be addressed during the partnership. These steps include educating the organization, making your partnering intentions known, commitment from top management, completing the partnering workshop, completing periodic assessments of the effectiveness toward attaining goals, escalating issues when necessary and final evaluation at the completion of the project (5-6).

7.4.1 Educating The Organization

As with any new activity a group undertakes, they must become knowledgeable about the process before they attempt to do it. Partnering will not be effective unless everyone is on board. The organization as a whole must understand the total commitment required for success to be achieved through this program (5-6).

7.4.2 Making Your Partnering Intentions Known

Due to the commitment required for success, partnering is not something that can be undertaken without a desire to partake of the process from both parties. The owner can make his desire to partner known to the contracting community in the project solicitation and contract specifications (5). The provision must clearly state the voluntary nature of partnering and that all costs associated with this processed will be equitably shared between both parties (5). Partnering participation may also be encouraged by sending a personal letter to each company owner on the bidders list or by giving a formal presentation during the prebid conference (5).

7.4.3 Commitment From Top Management

Partnering will not succeed if there is no true commitment from top management to its underlay goal. They must set the standard of commitment to the process for the organization to follow (20). Commitment to partnering also requires letting go of the reigns and empowering people with the both the responsibility and authority commensurate with their jobs (20). Without empowering those on the playing field, timely decisions can not be made.

Once committed to partnering, top management can identify their prospective company leader who will be responsible for the intricacies of the partnering agreement.

These team leaders from both parties should meet at a neutral site to introduce themselves and to begin developing healthy, professional relationships of each other (5). As a part of this introductory meeting, the team leaders should set a date to hold the workshop as soon as possible (5).

7.4.4 The Partnering Workshop

Ideally, the workshop should be held before starting work on the project since the workshop tends to be more effective at the beginning of a project (5). Having the workshop early on precludes development of misperceptions or disagreements between the teams before the process can begin (5). However, the principles employed by partnering can improve working relationships and help resolve conflicts at any stage of construction (5).

The workshop should be held at a neutral site with all key personnel present to participate in developing the partnering agreement (5). Key individuals are those who are directly responsible for the day to day affairs of the ongoing project and who have been delegated with contractual authority over the project. Depending upon the size of the organizations, the list of attendees may include the area manager, the project manager, the superintendent and project engineer for the contractor; the chief designer, the construction administrator and any consultants for the designer; the project manager and the superintendent for the subcontractors; and the project manager or representative

for the owner (5). Additional participates with specialty skills, such as testing laboratory representatives or those who are directly effected by the outcome of the construction project, such as public officials, may also be invited to the partnering roundtable (5).

Paragraphs 7.4.4.1 through 7.4.4.5 addresses specific issues relevant to the partnering workshop. They are holding a facilitated workshop, addressing individual roles and responsibilities, creating a partnering charter, developing a dispute resolution process and instituting a joint evaluation process. These following paragraphs will look at the partnering workshop in depth.

7.4.4.1 Facilitated Workshops

Often times on complicated or large projects completion of the workshop is assisted by a professional facilitator employed by the contracting parties. Both parties must agree to use and feel comfortable with a facilitator. The facilitator must be able to remain impartial and must possess a basic knowledge of the construction process to be effective (5).

A facilitator can be very helpful to a group undertaking their first partnering experience. He can help ease the uncertainty and tension that may exist at the onset of the workshop (5). His presence will also give the participants more confidence in their ability

to properly implement the partnering principals and to achieve the desired result (5).

Even though the facilitator does not fill the lead role in the workshop, as a trained professional, his skills can greatly enhance the quality of the workshop by helping the group to maintain focus on the their objectives (5). Thus, it is the facilitator's job to guide the team from where they are to where they want to be at the workshop's conclusion. He may assist in organizing the workshop agenda, provide training to improve the participants' communication and conflict management skills or generate insights into personal problem solving techniques (5). He may also help the participants develop the partnering charter, the issue resolution process and institute a joint evaluation process (5).

Typically behavioral psychologist, organizational psychologists, industrial psychologists, management consultants or people in the education field serve as professional facilitators (5).

7.4.4.2 Individual Roles And Responsibilities

Each individual present at the partnering workshop must define their strategic role for accomplishing the project (5). They should clearly describe what is required from the other members to successfully accomplish their task. An individual should also table

their perceived weaknesses or strengths at this time so that their performance can be maximized during the project (5).

Individual risks and any foreseen potential problems for completing the project as planned should also be addressed and discussed openly between the members. This helps everyone view completion of the project through each other's eyes fostering a greater sense of teamwork and cooperation (5).

Through this discussion, members begin to understand and become comfortable with the personalities of those they will be working closely with throughout the project (5). This personalizing of the "enemy" helps nurtures good working relationships and opens the lines of communication between the members. For this reason alone, a productive workshop will provide significant returns on the rather small investment of time and money (5).

7.4.4.3 Creating the Partnering Charter

The mutual objectives established between the parties forms the charter for the partnering agreement. During the process of developing concurrent goals, the key players undergo a discovery process of each other. The members begin to better understand each other and develop a teamwork attitude about accomplishing the project together. Emphasis is redirected from the

common us-them attitude within the industry toward one focused on cooperative execution of the project. The charter not only evolves into a symbol of personal commitment to each other, but services as a benchmark by which actual performance is later appraised (5). Upon its completion, the charter is symbolically and ceremoniously signed by the participants as a further outward sign of their personal commitment to each other and to the success of the project (5).

7.4.4.4 Dispute Resolution Process

Due to the nature of construction, problems are bound to occur whether it is at the site or because of contract administration procedures. Most of these problems tend to be resolved expediently at the lowest level of management without impacting the construction progress. From time to time however, problems arise which take too long to resolve or just gets bogged down in the system.

During the workshop, the participants devise methods to expedite resolution of problems that have traditionally plague the construction industry (5). Any area of project execution is subject to scrutiny by the participants in the workshop. Issues such as billing procedures, submittal reviews, change order execution or design related problems are openly discussed (5). Each issue that is identified as being

7.4.5 Periodic Evaluation

Periodic evaluation to assess the progress made toward achieving the goals of the charter is essential toward keeping the construction "team" on track (5). It acts as a check to ensure the cooperative attitude and team spirit created during the workshop has not be deluded. This is accomplished by refocusing the attention of the major players back to the objectives the workshop generated (5).

7.4.6 Escalation of Unresolved Issues

Regardless of the good intentions of partnering, due to human nature disagreements are bound to arise between the parties during the completion of the project. It is important that these conflicts be resolved as quickly as possible to avoid the potential for their mushrooming (5). The people from both sides directly involved in the on-site construction should be encouraged to bring any issue that they can not resolve to the next higher level of management (5). By doing this, the cost and time associated with getting back on track will be minimized and the confidence and good will developed between the parties will be salvaged (5). It is also less likely for solvable problems to turn into potential claims or disputes between the parties by bringing an issue to a head (5).

7.4.7 Final Evaluation

Upon completing the project, the parties should constructively evaluate the partnering process. Answering

questions such as; have the goals of the charter been met, what problems came up during construction that could have been handled more smoothly and efficiently, and what worked or did not work, will prove beneficial to both (5). Lessons learned is an invaluable tool which can be used as a guide to improving performance on future partnering projects.

7.5 BENEFITS OF THE PARTNERING PROCESS

Though partnering tends to increase the time and money spent by the parties initially, there is an overall savings derived from the good working relationship, job efficiency and elimination of the significant cost associated with pursuing claims or litigation (5-3). Partnering encourages action, entrusts responsibility and delegates responsibility at the lowest level of management possible. It helps to generate good working relationships between the parties, enhances personal job satisfaction through increased responsibility, fosters pride and professionalism and encourages everyone associated with the project to perform above the set standards (5). The end result of a successful partnership is that all parties walk away from the project with a greater sense of accomplishment, achievement and financial reward (5).

Through their personal experience, The Associated General Contractors of America strongly feel that the partnering process does work (5). They suggest it fosters a win-win atmosphere where project success is achievable for

everyone. Many within the industry from both the contractors and owners "camp" believe partnering benefits not only the owner and the contractor, but the designer, subcontractors and suppliers as well. The following paragraphs identify The Associated General Contractors of America's perception of the overall benefits derived from the partnering process.

7.5.1 Benefits To The Project Owner

1. Reduced potential for claims and litigation through improved communication and agreed strategies for conflict resolution.

2. Reduction of managerial and administrative cost resulting from the elimination of the defensive case building posture.

3. Improved control of time and cost over the project execution reducing exposure to project over runs.

4. Focusing of energies toward completion of a quality product and away from adversarial encounters.

5. Increased potential for early project completion through efficiencies derived from a team approach.

6. More effective and efficient problem resolution through open, honest communication.

7. Better opportunity for design improvement or efficient constructability through a willingness to remain receptive to innovative changes and value engineering proposals.

8. Greater potential for economy through a win-win attitude opening the door for improved efficiency by reducing construction time, overhead, claims/litigation expenses and construction costs.

9. Greater potential for successfully accomplishing the project on time and within budget (5-3).

7.5.2. Benefits To The Prime Contractor

1. Reduced potential for claims and litigation through improved communication and agreed strategies for conflict resolution.

2. Improved productivity and a reduction of managerial and administrative expenses due to the elimination of the defensive case building posture.

3. Improved control of time and cost over the project execution reducing exposure to project over runs.

4. More effective and efficient problem resolution through open, honest communication.

5. Improved cash flow through reduction of disputes and retention.

6. Greater potential for economy through a win-win attitude opening the door for improved efficiency by reducing construction time, overhead, claims/litigation expenses and construction costs.

7. Greater potential for successfully accomplishing the project on time and within budget (5-3).

7.5.3 Benefits To The Designer And Consultants

1. Reduced potential for claims and litigation through improved communication and agreed strategies for conflict resolution.

2. Improved productivity and a reduction of managerial and administrative expenses due to the elimination of the defensive case building posture.

3. Reduces liability potential for design errors or omissions by minimizing associated costs through a team approach to early identification and expedient resolution of problems.

4. Active role in the decision making and construction process by clarifying design intent and assisting in problem resolution.

5. Greater potential for economy through a win-win attitude opening the door for improved efficiency

by reducing construction time, overhead, claims/litigation expenses and construction costs

6. Greater potential for successfully accomplishing the project on time and within budget (5-3).

7.5.4 Benefits To Subcontractors And Suppliers

1. Reduced potential for claims and litigation through improved communication and agreed strategies for conflict resolution.

2. Active role in the decision making and construction process as a team member.

3. Improved cash flow through reduction of disputes and retention.

4. Greater potential for economy through a win-win attitude opening the door for improved efficiency by reducing construction time, overhead, claims/litigation expenses and construction costs.

5. Greater potential for successfully accomplishing the project on time and within budget (5-4).

7.6 POTENTIAL PITFALLS OF THE PARTNERING CONCEPT

The potential for partnering to fail lies with the lack of commitment from any stakeholder and their failure to uphold the bargain struck at the partnering workshop. Without all parties buying into the process and committing themselves to the goals and objectives established in the partnering charter, little will be achieved. Without a true desire to participate, partnering offers little to eliminate the drawbacks of the current contracting atmosphere that is based on a lack of trust and understanding uncooperativeness and miscommunication.

The idea of partnering can be uncomfortable at first. The trust you endear to the other players may feel as though

you are exposing yourself to greater risk (5). Most of us trained in the "win-lose" environment have preconceived notions of the "opponents" underlying objectives (5). It is tough shedding the old ideology we have maintained for years for an idea based on teamwork and confidence in a newly formed alliance (5). Without the attitude that everyone will end up a winner at the conclusion of the project, the aspirations endeared by the partnering concept is marked for failure from the start.

CHAPTER EIGHT
SUMMARY

Construction contracts founded on the principal of fixed price, low bid award are extremely competitive by their very nature. With this competition come bids having extremely tight margins of error or none at all, significantly increasing the risk to the builder. Funding to complete the project is often times as tight for the owner as the bid proposal is for the contractor. The owner anticipates and expects to receive a complete and usable facility for the amount of the bid with a modest amount set aside for contract modifications.

Without enough monetary leeway to address issues within the contract documents that are inferred or vaguely implied, the contractor is forced to demand additional compensation to complete the work. As the construction market becomes increasingly more competitive, contractors are left to bid their performance on the bare minimum necessary to fulfill contractual obligations and routinely take a literal approach to contract interpretation. Warnes expounds upon this when he states:

> No longer is the intent of the specification at issue in a claim. Rather, the tendency is to consider the placement of commas, semicolons, the order of sentences and other subtle formatting characteristics of the specifications in the decision making process. Gone is

> the desire to meet the intent of the specification or the vision of the end product that was originally sought after (20).

Likewise, to stay within a fixed project budget, the owner and designer take a broader approach to the scope of the work as they intended the project to be performed. As a result, the parties to the contract often disagree over the responsibility of performance.

As has been the case for years, fixed price competitively bid contracting traditionally generates misperceptions from both sides of the fence. Both perceive that the other party as not committed to completing the project as was intended. Mistrust of each other's objectives is common from the inception of the project. Misperceptions of the other's "underlying objectives" grows as the project proceeds. This is often followed by accusations of "gold digging", divorcing the parties further from a spirit of cooperative teamwork.

This type of contracting has set the stage for conflict between all parties associated with the project including the owner, the designer, the contractor, the subcontractors and suppliers. The result leads to adversarial relationships and a lack of cooperation between the parties to the contract. The overall effect is a breakdown of teamwork, a drop in performance, an increase demand on management's time, dissatisfaction between the parties, additional expense and ultimately unresolvable conflicts. Fear of claims and the potential for litigation abounds

throughout the execution of the work. By the completion of the project no one feels a sense of accomplishment.

As this adversarial atmosphere has intensified within the industry over recent years, the reliance upon litigation to resolve disputes has also grown. Litigation by its very nature is expense and counter productive to both the owner and the contractor. Untold hours of effort and exorbitant sums of money can easily be spent preparing for and defending a contractual law suite. There are no winners when contractual disputes are elevated beyond the control of the immediate parties and placed into the hands of the judicial system. Claims and disputes are counterproductive to the ultimate goal each party is trying to achieve; that being timely and cost effective delivery of quality construction.

Past attempts to shift undue responsibility and risk onto one of the contracting parties over which they have little or no control frustrates the construction contract process. Grandoff suggests this is the one of the reasons behind, "the recent proliferation of disputes and litigation in the construction industry" (10). Not sharing responsibility or risk equitably seems to be a major problem behind the disfunctional performance in the construction contract industry. Akin to that, the attitude that there can only be one party who comes out ahead still permeates the industry. This "win-lose" attitude must be replaced with a "win-win" attitude for improvements to be made

between the owner, designer and contractor relationships as they exist today. Without embracing the philosophy of mutuality of purpose, claims and litigation will continue to spiral out of control.

Arbitration as a dispute resolution technique has reduced the need to use litigation to resolve contract claims. The Disputes Review Boards appear to be making significant progress toward fulfilling this need. This arbitration technique has recorded an impressive track record as Vorster notes:

> No litigation has been necessary and only 30 disputes have required formal review on the 12 high risk heavy civil engineering projects which have used the concept and which have been completed in the last ten years [Shanley 1990]. A review of work in progress shows that the concept has been implemented on over 60 projects with a contract value in excess of $2.9 billion and that no litigation has occurred on any of the work (19).

Though more cost effective than litigation, it appears Disputes Review Boards can still be expensive to undertake due to the frequent need to have the arbitrators visit the site and interact with the contract parties. For this reason they are generally geared toward larger construction projects.

Arbitration as defined by Webster's dictionary is, "the hearing and determination of a case in controversy by a person chosen by the parties or appointed under statutory authority." By its very nature, arbitration does not respond to the basic need to work together toward settling

differences between the parties through compromise. Though still a far better forum for dispute resolution than litigation, as with adjudication, it relies on third party intervention to resolve disputes. Both parties still see a need to maintain an arms length approach to contract management and find it necessary for an outsider to settle "family squabbles." Contracting parties, in essence, have grown reliant on third party intervention as a fact of life for resolving differences in the construction industry. This approach to construction contracting does little to promote the teamwork essential for successfully completing a construction project.

Construction projects are filled with unknowns and unforeseen circumstances that require vital coordination between the contractor, numerous subcontractors, various trades, a multitude of suppliers, regulatory authorities, the customer and the design team. It is an almost impossible task to complete a construction project on time and within budget unless there is significant cooperation between all of these parties. Though arbitration forums help settle disputes, they do nothing to promote teamwork, efficiency and effectiveness of the workers. This is were I feel arbitration's shortcomings lie.

Partnering is somewhat different from the other forums of dispute resolution. The goal of arbitration is to resolve construction disputes before they get out of control and require legal intervention. However, the main premise

of partnering is to encourage teamwork and commitment to prevent disputes from ever occurring. Partnering attempts to alter the adversarial relationships that have driven the construction industry participants apart over the years. It is a pact of commitment freely entered into by the contracting parties based on a spirit of cooperation and trust. The other dispute forums do nothing to foster a team attitude between the parties that appears to have a significant impact on the quality achievable through construction contracting. Most construction contract managers still fight tooth and nail with contractors on every issue. Eventually they end up relying on legal enforcement to achieve the desired results.

The Arizona State Department of Transportation is a true believer in partnering. In 1993 over $23 million in claims were filed against the department representing a seventy percent increase over the prior four years (20). Beginning in July 1991, the department started partnering with an initial eleven construction projects. These first eleven projects were completed on the average 17% ahead of schedule saving the department an estimated 20 percent in engineering costs (20). An additional $900,00 was also realized in improved value engineering implementation alone (20). During the eighteen month period since then, they estimate $11 million in direct savings was achieved through partnering on 120 projects (11). The Department has since completed over 80 projects without litigation. In

contrast to this, the previous year's litigation budget amounted to $30 million (11). The Arizona State Department of Transportation also estimates the amount of savings will continue to grow exceeding $20 to $25 million per year in the future (11).

Partnering was also used during the construction of a $66.7 million, 254,000 square foot research laboratory addition to Pfizer Incorporated in Groton, Connecticut (22). Partnering has been credited for delivering the project under budget, without a single serious work related injury and two years ahead of schedule (22).

There are numerous other tales of the ground breaking results partnering is accredited with in the construction industry. These few examples are only representative of the results partnering is achieving across the board.

In summary, the type of dispute resolution method selected for use in construction contracts must be based on the goals of the parties, the contract size and the participants in the contract. However, no forum of dispute resolution will be effective without a willingness from all sides to be honest to its principals. No matter how good contracts are written, it comes down to the people executing the work that really makes the difference between success and failure. As noted by Beck,

> Irrespective of the contracting arrangement or the contract language selected, people are generally what makes a successful project succeed, and it is generally

> people that make an unsuccessful project fail. This is true under the arm's-length, adversarial method of contracting which currently dominates the industry - and even more true under partnering. (7-13)

Developing a workable dispute resolution mechanism that serves the interests of both parties is essential for a turn around to occur in what is now becoming a litigation happy industry. Executing contracts that are complete, share risk appropriately, foster good working relationships, rely on open and timely communications and encourages non-adversarial relationships between the parties can have an insurmountable effect on the effectiveness of the contract and the quality of the construction. Contracts that are geared toward timely, cost effective implementation will result in a smoother project completion and will reduce the overall expense to all the contracting parties.

What ever type of contracting method or dispute resolution technique is chosen, there must be a mutuality of purpose and equitable risk sharing to avoid if not to overcome disputes and litigation (23). It is time America woke up and listened to the music. It is imperative that all parties to the contract become willing to share in both the rewards, the risks and the potential for failures for the construction contracting process to once again become an effective instrument for executing construction.

BIBLIOGRAPHY

1. American Arbitration Association, Construction Contract Disputes: How They Can Be Resolved, New York, August 1992, pp. 1-9

2. American Arbitration Association, Guidelines For Expediting Larger, Complex Construction Arbitrations, New York, August 1991, Unpaged

3. American Institute of Architects, General Conditions of the Contract For Construction, AIA Document A201, 1987, pp. 1-24

4. Arizona State Department Of Transportation, Partnering: A Strategy For Excellence, A Compilation Of Partnering Documents by Charles E. Cowan, 1991, Unpaged

5. Associated General Contractors of America, Partnering: A Concept For Success, Sept 1991, pp. 1-11

6. Barrie, Donald S. and Boyd C. Paulson, Professional Construction Management, Third Edition, McGraw-Hill, Inc., New York, 1992, pp. 449-477

7. Beck, Philip E., "A Lawyer Looks At Partnering", Dixie Contractor, January 25, 1993, pp. 12-13

8. Engineering News Record, "Partnering Paying Off On Projects", October 14, 1991, p.25

9. Engineering News Record, "Your Choice Makes A Difference", February 11, 1991, Unpaged

10. Grandoff, J. Bert, "Preventing and Resolving Construction Disputes," in Basic Construction Law: Proceedings of the 1992 Construction Law Seminar in Miami, Florida, September 17, 1992, by the Young Lawyers Division of the Florida Bar, 1992, pp. 5.1-5.12

11. Hart, Roger D., TQM - Putting Theory Into Practice, The Benefits, Paper presented as part of the symposium, "Total Quality Management - Putting Theory Into Practice" at the 72nd Annual Transportation Research Board Meeting 1993, January 10 - January 14, 1993, pp. 1-23

12. Heyer, Albert W. III, Contracting For Professional And Construction Services, Lecture presented to the School of Building Construction, University of Florida, Gainesville, Fl., March 24, 1993, pp. 1-8

13. Kornblut, Arthur T., Construction Documents & Services 2, Architectural Licensing Seminars, 1988, pp. 1.20-1.22, 3.3-3.10

14. Lunch, Milton F., "Key Design/Construction Issues Highlighted At Industry Meeting", Building Design And Construction, June 1993, p. 31

15. Smith, Robert, J., A Look At Modern Techniques of Risk Assignment, Paper presented as part of the symposium "Minimizing Construction Contract Disputes" at the Florida Transportation Forum 1991, Gainesville, Fl., November 14, 1991, pp. 1-23

16. Sweet, Justin, Legal Aspects of Architecture, Engineering, and the Construction Process, Fourth Edition, West Publishing Company, St Paul, Minnesota, 1989, pp. 671-703

17. Tarricone, Paul, "Deliverance", Civil Engineering, February 1993, pp 36-39

18. Vorster, M. C., "Claims Avoidance and Resolution", Transportation Construction Management Institute, Undated, pp. 1-13

19. Vorster, M. C., "Dispute Review Boards; Not Just Another Alternative Dispute Resolution Method", Transportation Construction Management Institute, Undated, Unpaged

20. Warne, Thomas R., Partnering: A Strategy For Success, Arizona Department of Transportation, Partnering Program, Undated, Unpaged

21. Woodrich, Anthony M., "Partnering: Providing Effective Project Control, Undated, pp. 136-141

22. Wright, Gordon, " 'Partnering' Pays Off", Building Design & Construction, Cahners Publishing, April 1993, pp. 36-39

23. Yarbrough, Roger L., "Quality Experience In Construction", Undated, pp. 137-146